United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF OF APPELLANT AND JOINT APPENDIX

984

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,002

COLONIAL PARKING, INC.

Appellant,

v.

JOHN MORLEY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF THE QUESTION PRESENTED

In the opinion of appellant the question is this:

Where a vehicle was stolen from appellant's parking lot and the following day, thirty-two hours later and twelve blocks away, the thief, while operating said vehicle, negligently collides with plaintiff a pedestrian, could appellant's negligence with respect to the operation of its parking lot be a proximate cause of plaintiff's injuries?

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an action for damages for personal injuries instituted in the United States District Court for the District of Columbia. A final judgment was entered for plaintiff-appellee from which this appeal is taken. The jurisdiction of this Court is founded upon the provisions of Title 28, Section 1291, U. S. Code.

STATEMENT OF THE CASE

This is an action for damages arising out of a collision between plaintiff, a pedestrian, and two automobiles in the District of Columbia. Appellant, Colonial Parking, Inc. was the operator of a parking lot at 1721 Corcoran Street, N. W., Washington, D. C. from whose lot one of the vehicles which collided with plaintiff, was stolen the day before. The other vehicle was owned and operated by Mary Ann Clapper Ott. In a trial before Judge Keech below, a jury returned a verdict in favor of defendant Ott and for plaintiff against Colonial Parking, Inc. only for damages for $20,000.00 (J.A. 36). A directed verdict was also entered by the Court in favor of the owner of the stolen vehicle Thomas Chacho For the purposes of this appeal, appellant will sometimes be referred to as Colonial, appellee as plaintiff or Morley and the owner of the vehicle in question as Chacho.

On May 16, 1963, Chacho, a personnel officer at the World Health Organization drove his vehicle, a 1963 Rambler station wagon, to the Colonial parking lot at 1721 Corcoran Street, N. W., Washington, D. C. (J.A. 25). Chacho had a monthly agreement with Colonial for the rental of space at this lot for which he paid $11.00 a month (J.A. 22). As was his custom, Chacho drove his vehicle onto the lot about 8:00 a.m. and left his car with the key in the ignition near the attendant's shed for the attendant to park it (J.A. 25, 26) About 6:00 p.m. that evening Chacho returned to the lot to get his car, whereupon the attendant proceeded to tell him that he thought he had already taken it off the lot. When it was discovered missing, the police were summoned along with the Colonial Parking management and a neighborhood search was made for Chaco's vehicle (J.A. 26, 33). The attendant told Chacho that he had left the lot for about 10 minutes around noon that day and when he returned, the Chacho car was missing. The attendant assumed Chacho took it himself (J.A. 26, 31). On other occasions, Chacho had left his office early and had taken the car from the lot himself (J.A. 33). The car was parked towards an alley

which ran parallel to Corcoran Street with the front of the car facing the alley (J.A. 28).

At about 8:30 p.m. on May 17, 1963, the Chacho vehicle, operated by one Willie Sheler struck Morley who was then directing traffic on 16th Street, N.W. in front of the Mexican Embassy. Morley was thrown in front of another vehicle driven northbound by Mary Ann Clapper Ott who also ran over him. This suit was instituted against Colonial, Ott and Chacho (J.A. 1) and this action came on for trial on February 8, 1967 (J.A. 39)

At the trial, Morley testified that about 8:00 p.m. on May 17, 1963, he reported to the Mexican Embassy, where a reception was being held for President Johnson, with instructions to assist in directing traffic therefrom. Morley went to the north entrance of the semicircular driveway to the dividing line which separates north and southbound traffic on 16th Street to assist with the outflow of traffic from that section of the driveway (J.A. 10-14). Another officer, James Sprowls, was stationed at the south end of the driveway. It was dusk and drizzling rain. Morley had on a raincoat and a flashlight in his hand and as he was directing traffic he was struck by a vehicle proceeding south on 16th Street (J.A. 13-14).

His partner Pvt. Joseph Sprowls, who was assisting the inflow of traffic at the south entrance to the Mexican Embassy, testified that the vehicle which struck Morley, was straddling the white dividing line and Morley was knocked in the direction of the east curb in a line of traffic where he was also run over by a northbound vehicle driven by Ott (J.A. 17). This southbound vehicle slowed down and came to where Sprowls was standing; then Officer Sprowls with an assist from another officer, commandeered a car and went after the fleeing southbound vehicle (J.A. 17-18). The operator was eventually apprehended near Kalorama Road about 15 minutes after the collision (J.A. 19).

It was stipulated at the trial as follows: (J.A. 19).

> "The motor vehicle owned by Thomas Chacho was stolen on May 16, 1963 by one Willie Sheler of 1414 Girard Street, N.W., Washington, D.C. from a parking lot operated by Colonial Parking, Inc., 1721 Corcoran Street, N. W., Washington D. C. At about 8:30 p.m. on May 17, 1963 while operating the stolen vehicle southbound in the 2700 block of 16th Street, N. W., Washington, D. C. Willie Sheler struck and injured the plaintiff John J. Morley. The distance between the aforesaid parking lot and the place of the accident is about twelve city blocks.

At the conclusion of the plaintiff's case defendant Colonial moved for a directed verdict on the ground that the plaintiff failed to prove any facts upon which a jury could infer that any negligence on the part of Colonial was a proximate cause of plaintiff's injuries. Arguments were heard thereon at this juncture in the case and at the conclusion of all the evidence and denied (J.A. 20). The motion of Chacho for a directed verdict made following the opening statements, was granted. After deliberation the jury returned a verdict in favor of Ott and for plaintiff against Colonial in the sum of $20,000.00 (J.A. 36). Colonial filed a timely motion for judgment notwithstanding the verdict, which was denied on March 13, 1967 (J.A.37). A notice of appeal therefrom was filed on April 10, 1967 (J.A. 38).

STATEMENT OF POINTS

The points upon which appellant intends to rely on appeal are:

(1) There were no facts on the issue of proximate cause for jury consideration and accordingly, judgment notwithstanding the verdict should have been granted.

(2) The negligence of Colonial Parking, Inc. sought to be charged was too remote from the accident in time, place and circumstance to be a proximate cause thereof.

SUMMARY OF ARGUMENT

This Court has stated on innumerable occasions, for plaintiff to recover both negligence and proximate cause must be proved. The most that can be said for plaintiff's case here is that there was evidence of negligence on the part of Colonial but there was not a scintilla of evidence that any such negligence of Colonial proximately caused the injuries to plaintiff who was struck by a vehicle stolen from Colonial's lot the day before and negligently operated by the thief.

Proximate cause by definition requires that there be a natural and continual sequence, unbroken by any efficient intervening cause from the negligence to the injury. And although the criminal act of a thief has been held by this Court not to be such an efficient intervening cause, nevertheless the negligence in connection with the theft must also be a cause, in natural and continual sequence, that produces the injury, and without which the injury would not have occurred. The definition does not fit the facts here.

In this case the theft preceded the injury by thirty-two hours and the accident happened only twelve blocks away from the lot. Under the most recent decisions of this Court in point and from a review of authorities elsewhere, the negligence of Colonial must be deemed too remote in time and circumstances to be a proximate cause of plaintiff's injuries.

ARGUMENT

I

The Negligence of Colonial in Its Parking Operations Was Not a Proximate Cause of the Injuries to Morley Who Was Struck by a Vehicle Stolen From Its Lot Thirty-Two Hours Before the Accident and Negligently Operated by the Thief.

A. The time factor alone renders the issue of proximate cause too remote as a matter of law.

There is but one issue in this appeal and that is proximate cause. The salient facts with respect thereto are these: About noon on May 16, 1963, Colonial's attendant left the parking lot at 1721 Corcoran Street, N. W. for about 10 minutes and upon his return, he found the Chacho vehicle missing (J.A. 26). He assumed that it was driven from the lot by Chacho (J.A. 26, 31). The following day at 8:30 p.m., this vehicle, operated by one Willie Sheler, negligently collided with the plaintiff on 16th Street, N. W. in front of the Mexican Embassy, approximately 12 blocks from the Colonial parking lot. Under these circumstances then, the question is whether the negligence of Colonial in leaving its lot unattended could be a proximate cause of Morley's injuries.

In the landmark case of *Ross v. Hartman*, 1943, 78 U.S. App. D.C. 217, 139 F.2d 14, cert. denied, 321 U.S. 790, a truck driver had left his vehicle standing in a public alley with the keys in it, in violation of the D. C. Motor Vehicle Regulations requiring a person to lock the ignition of a motor vehicle left on public space. The truck was stolen and within two hours, the plaintiff Ross was injured by the negligent operation of the truck by the thief. The owner of the truck was held liable, this Court holding that the violation of this ordinance was clearly both negligence and the proximate cause of the injury. Subsequently, in *Schaff, et al. v. R. W. Claxton, Inc.*, 1944, 79 U.S. App. D.C. 207,

144 F.2d 532, cert. denied, 335 U.S. 871, the defendant Claxton's truck was left in a private parking space of a restaurant with the keys in it. Employees of the restaurant drove off injuring the plaintiff. The lower court directed a verdict for the defendant but this Court reversed and remanded the case for a new trial, holding that although the restaurant parking space was not a "public space", the evidence should have been submitted to the jury with instructions to find for the plaintiffs if they found that the defendant's driver was negligent in leaving the car unlocked and that this negligence was a proximate cause of the accident. The case was again appealed after a retrial and affirmed. 83 U.S. App. D.C. 271, 169 F.2d 303.

The *Ross* case was decided on the basis of a violation of a safety ordinance against leaving an unlocked, unattended car in a public place with the keys in the ignition (Traffic and Motor Vehicle Regulations of the District of Columbia, § 98), the Court holding that since the negligence of the defendant-owner of the vehicle created the hazard which brought about the harm that the ordinance was designed to prevent, it was therefore the proximate cause thereof. The *Schaff* case did not involve a violation of this ordinance as that vehicle was left in the restaurant's private parking lot as opposed to a "public" space but this Court felt that the distinction was insubstantial. Here, however, we are concerned with neither the *Ross* nor *Schaff* situations. A parking lot operation is involved where keys are customarily left in cars and no local ordinance or statute is applicable. The negligence of the parking lot owner, therefore, to be a proximate cause of an injury must be viewed in terms of common law principles.

More closely in point to the factual situation at bar are the two cases decided by this Court following the *Ross* and *Schaff* cases. These are *Howard v. Swagart*, 1947, 82 U.S. App. D.C. 147, 161 F.2d 651. and *Casey v. Corson and Gruman Company*, 1955, 95 U.S. App. D.C. 178, 221 F.2d 51.

In *Howard v. Swagart, supra,* a car was stolen from a private parking garage. The thief, a garage employee, lent the car to a second employee who did not know it was stolen, and while in the second employee's possession, the car was involved in an accident in which the plaintiff sustained injuries. Both the automobile owner and the parking garage owners were sued, but a verdict was returned only against the parking garage owners. On motion, a judgment n.o.v. was entered for the garage owners, and the plaintiff appealed. This Court, in affirming, held that there was not enough evidence to go to a jury on the issue of proximate cause, distinguishing it from the *Ross* and *Schaff* cases, and then discussed proximate cause as follows: (page 655, 161 F.2d)

> "We do not think there is any justification to extend the holdings of these decisions [Ross and Schaff] to the circumstances of the case at bar. While such an application is possible, it is not practicable or justifiable, and would necessitate, and result in, a strained construction of the legal concepts pertaining to negligence and proximate cause. Dealing with the causation aspect first, this court has defined the proximate cause of an injury to be 'that cause which, in natural and continual sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred.' [Citing S.S. Kresge Co. v. Kenny, 66 App. D.C. 274, 86 F.2d 651.] The effect of our decisions in the Ross and Schaff cases was that a wilful, malicious and criminal act of an intermeddler was not an 'efficient intervening cause' in the circumstances there presented where the action was between the injured party and the owner of the car, and where the owner was held responsible. We are urged, assuming for the moment negligence on the part of appellees, to extend that legal responsibility to a situation where there is added a subsequent intervening cause coming into existence nearly twelve hours after the criminal act which constituted the original intervening cause, and involving not the owner of the vehicle,

> but his bailee. We feel constrained to oppose such an extension to the law of liability. * * *"

Further, the Court in considering a specific allegation of negligence, i.e., to leave a car unlocked in a parking lot with the key in the ignition, stated on page 655, 161 F.2d:

> "* * * Turning to the specific acts alleged we hold that, in this jurisdiction, leaving a car unlocked in a private parking-lot garage does not constitute negligence. It is common knowledge that the standard custom and practice of private-lot garages is to require the leaving of the key in the ignition switch of cars parked on the premises. * * *"

After *Howard v. Swagart*, the Court handed down a *per curiam* opinion in *Casey v. Corson and Gruman Company, supra,* which is directly in point. There, the truck was stolen from a private parking lot and the collision occurred several hours later south of Petersburg, Virginia. The keys had been left in the truck and it had been stolen from the defendant's lot. The lower court directed a verdict for the defendant parking lot at the close of the plaintiff's opening statement, and this Court affirmed, stating: (p. 52, 221 F.2d)

> "* * * The truck apparently had been stolen many hours prior to the collision. The negligence thus sought to be charged to defendant upon the principles of Ross v. Hartman, 78 U.S. App. D.C. 217, 189 F.2d 14, 158 A.L.R. 1370, certiorari denied, 321 U.S. 790, 64 S. Ct. 790, 88 L. Ed. 1080, was too remote from the collision in time, place and circumstances to be a proximate cause of plaintiff's injuries; and the law of Virginia, assuming it applies, imposes upon plaintiff no lighter burden than the case cited in order to attach legal responsibility to defendant."

In reviewing the briefs and lower court's opinion in the case of *Casey v. Corson and Gruman Company*, it is interesting to note the posture of that case as presented to this

In *Howard v. Swagart, supra,* a car was stolen from a private parking garage. The thief, a garage employee, lent the car to a second employee who did not know it was stolen, and while in the second employee's possession, the car was involved in an accident in which the plaintiff sustained injuries. Both the automobile owner and the parking garage owners were sued, but a verdict was returned only against the parking garage owners. On motion, a judgment n.o.v. was entered for the garage owners, and the plaintiff appealed. This Court, in affirming, held that there was not enough evidence to go to a jury on the issue of proximate cause, distinguishing it from the *Ross* and *Schaff* cases, and then discussed proximate cause as follows: (page 655, 161 F.2d)

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Court. That part of the opening statement upon which the lower court directed a verdict is found on page 23-A of the appendix to appellant's brief and quoted below:

> "MR. FAULKNER: Ladies and gentlemen of the jury: At this time we will withdraw our claim upon the ground that this accident happened as a result of the negligence of the employee of the defendant in operating this car in the course of his employment, and limit our claim to the ground that the accident was caused by the negligence of the defendant corporation in leaving the car so parked here in the District of Columbia with the key in the car that it created a hazard, that someone would and did enter the car and drive it away negligently and caused the accident.
>
> "In support of that statement we expect to show, as I previously outlined, that the key was found in the car firmly wedged in the car right immediately after the accident, and that this particular type of car or truck could not be operated without the key in the car, and that the evidence will show that this particular key will not only lock the car but it locks the engine, but it locks the steering gears so that it can't be operated if it is taken out of the car."

In the written opinion of the Court below (Holtzoff J.) the *Ross* decision is criticized as a "drastic departure from the common law" and the Court there concludes that as the law of Virginia where the accident occurred controls, then *Ross* is not binding. Under Virginia law, an owner of the vehicle is not liable for damages caused by a thief's negligence.

Interestingly enough, the case was brought to this Court on a conflict of laws question, i.e., whether the law of the District of Columbia or Virginia controlled the determination of defendant's liability. The questions presented by appellant are as follows:

"STATEMENT OF QUESTIONS PRESENTED

"Where plaintiffs' counsel in his opening statement stated plaintiffs would show that the corporate defendant-owner left its dump truck parked and unattended in the District of Columbia, with the ignition key in the switch and that the truck was stolen by an unknown person who negligently operated it in Virginia and caused it to collide with and demolish the truck of a plaintiff-owner and seriously injured the other plaintiff-operator, did the trial court err in directing a verdict for the defendant upon the grounds

(a) that the liability in such a case is governed by the law of Virginia where the collision occurred, and not by the law of the District of Columbia, where the defendant's act of negligence occurred; and

(b) that the law of Virginia bars recovery."

These questions were accepted by appellee as correctly stating the issues, the only modification being (as stated by appellee) that the truck was stolen from appellee's private parking lot rather than from a public street.

In appellee's brief it is tacitly conceded that were the District of Columbia law to apply, the result would be different or at least "doubtful". But much to the contrary, this Court in a per curiam opinion held that law of both jurisdictions was consonant and in line with the majority view with respect to the plaintiff's burden of proof. This decision seemed to favor the reasoning of Judge Clark in his dissent in *Claxton v. Schaff*, 83 U.S. App. D.C. 271, 169 F.2d 303:

> "I do not believe that the evidence of this case makes even a stagger in the direction of proximate cause and certainly is insufficient to justify the submission of proximate cause to the jury."

This Court has defined proximate cause of an injury to be "that cause which, in natural and continual sequence, unbroken by any efficient intervening cause, produces the in-

jury and without which the result would not have occurred." *Kresge Co. v. Kenny*, 66 App. D.C. 274, 86 F.2d 651; *Howard v. Swagart*, *supra*.

In the *Ross* and *Schaff* cases this Court held that the criminal act of the thief was not an "efficient intervening cause" in the circumstances there presented but in *Howard*, particular note was made of the fact that the stolen vehicle "remained at rest for nearly twelve hours after the original intervening cause * * *", which would clearly break any "continual sequence" from the negligence to the accident. Similarly here, over a day elapsed between the theft and the accident and to say that there was a "natural and continual" sequence from the negligence sought to be charged against Colonial and the accident would be to hoodwink the plain language of the definition.

B. The degree of quantum of negligence does not affect the issue of proximate cause.

The thrust of plaintiff's argument is that the parking lot industry should not be immunized from liability in the maintenance and operation of its parking lot business. With this, we do not disagree. But we add that a parking lot owner should be held liable for its negligence which proximately causes injury to others and it is on this latter point that we depart from plaintiff's reasoning. Under his theory, a parking lot owner would be, in a sense, an insurer for the negligence of a thief, irrespective of time, distance and circumstances. Even when a statute is involved, no court has to date advanced such a theory.

> " 'To our knowledge, no court has yet held such a statute * * * to impose upon a driver a duty to remove his keys running to the benefit of any person whom a thief or his successor in possession might meet and injure hours, days or weeks after the theft.' " *Cortini v. Wittkopp*, 1959, 355 Mich. 170, 93 N.W.2d 906, 909.

Considerable stress is placed by the plaintiff on the issue of defendant's negligence but the causal connection between this negligence and the injury to Morley is left, as it must be, hanging. Negligence, no matter how gross, is of no consequence unless it is also a causative of the injury complained of. "Proof of negligence in the air, so to speak, will not do". Pollack, Torts (11th Ed.) p. 455, cited in *Palsgraf v. Long Island R. Co.*, 1928, 248 N.Y. 339, 162 N.E. 99. And in *Richardson v. Gregory*, 1960, 108 U.S. App. D.C. 263, 281 F.2d 626, this Court speaking through Judge Burger stated on page 629, 281 F.2d:

> "Negligence alone does not equal *liability*. A simple breach of duty having no causal connection with the injury cannot produce legal responsibility. The car in question may lack automobile registration tags – a clear violation of statute or regulations – but this omission could hardly be a proximate cause or contribute to injury in a legal sense; hence it is of no consequence. See Ross v. Hartman, supra, 78 U.S. App. D.C. at page 218, note 10, 39 F.2d at page 15; Howard v. Swagart, 1947, 82 U.S. App. D.C. 147, 161 F.2d 651; *Casey v. Corson and Gruman Co.*, 1955, 95 U.S. App. D.C. 178, 221 F.2d 51. We have consistently emphasized that both negligence *and* causation must be proved before the plaintiff can have a verdict. Danzansky v. Zimbolist, supra, 70 App. D.C. at page 236, 105 F.2d at page 459. * * *" (emphasis supplied)

In sum then, plaintiff's emphasis on Colonial's negligence is of no moment unless it is shown also to be causative of his injuries. This simply cannot be done either in logic or by legal definition as the sole, proximate cause of Morley's injuries was the negligence of the thief.

II

Most Jurisdictions Have Rejected the Ross Rule in Determining Liability for Injuries in Which a Stolen Vehicle Is Involved.

As a preface to this section appellant does not contend that *Ross* must be overruled for a reversal of the judgment in this case, as the factual patterns are dissimilar. But a review of the decisions in other jurisdictions shows *Ross* to represent a small minority view.

Most jurisdictions hold that a violation of statute or ordinance prohibiting the leaving of a vehicle unattended on a public highway with the key in the ignition could not be a proximate cause of injuries inflicted on another by a thief. Only one case could be found which held that the statutory violation was the proximate cause of the ultimate injury as a matter of law, if the injury occurred in the thief's flight, *Ostergard v. Frisch*, 333 Ill. App. 359, 77 N.E.2d 537 (1948). This case has been impliedly overruled however by *Ney v. Yellow Cab Co.*, 2 Ill.2d 74, 117 N.E.2d 74, 51 A.L.R.2d 624, which held that the question was one for the jury.

The cases dealing with injuries occasioned by a thief in a stolen vehicle are decided in one or two ways: either the act of the thief is characterized as an efficient intervening cause or the time and place of the accident vis-a-vis the theft renders the former too remote in law to be a proximate cause of injury. In some cases there is an admixture of both principles. See for instance *Liberto v. Holfeldt*, 1959, 221 Md. 62, 155 A.2d 698. A refinement of the remoteness principle allows recovery for injuries if accident occurs during the flight of the thief, and conversely the termination of the flight renders proximate cause of the negligence of a parking lot from which

a vehicle was stolen, remote as a matter of law.[1]

Another group of cases involves the situation where no statutory violation exists. These cases also hold that the theft plus the tortious conduct of the thief constitutes an efficient intervening cause.[2]

The Court in *Childers v. Franklin*, 1964, 46 Ill. App. 2d 344, 197 N.E.2d 148, discusses the flight of the thief as determining remoteness and proximate cause. In this case, defendant parked his car on a private parking lot provided by a school, left the car unlocked and the keys in the car and proceeded to watch an athletic event. Three persons stole the vehicle and proceeded some distance from town when the vehicle collided with the plaintiff's vehicle. The court summarized the applicable law [197 N.E.2d 151]:

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[1] For this grouping of cases see: Galbraith v. Levin, 323 Mass. 255, 81 N.E.2d 560 (1948); Cockrell v. Sullivan, 344 Ill. App. 620, 101 N.E.2d 878 (1951); Kiste v. Red Cab, 122 Ind. App. 587, 106 N.E.2d 395 (1952); Frank v. Ralston, 145 F. Supp. 294 (D.C. Ky. 1956), aff'd, 248 F.2d 541 (6th Cir.) [parking lot]; Gaver v. Lamb, 282 S.W.2d 867 (Mo. App. 1955); Ross v. Nutt, 177 Ohio St. 113, 203 N.E.2d 118 (1964); Hersh v. Miller, 169 Neb. 517, 99 N.W.2d 878 (1959); Lambotte v. Payton, 147 Colo. 207, 363 P.2d 167 (1961); Permenter v. Milner Chevrolet Co., 229 Miss. 385, 91 So. 2d 243 (1956); Richards v. Staley, 43 Cal. 2d 60, 271 P.2d 23 (1954); Clements v. Tashjoin, 92 R.I. 308, 168 A.2d 472 (1961); Curtis v. Jacobson, 142 Me. 351, 54 A.2d 520 (1947); Bryant v. Atlantic Car Rental, Inc., 127 So. 2d 910 (Fla. App. 1961); Bouldin v. Sategna, 71 N.M. 329, 378 P.2d 370 (1963); Call v. Huffman, 163 So. 2d 397 (La. App. 1964), writ refused, 246 La. 376, 164 So. 2d 361 (1964); Meihost v. Meihost, 29 Wisc. 2d 537, 139 N.W.2d 116 (1966).

[2] In accord with this theory are: Farley v. Sley System Garages, 187 Pa. Super. 243, 144 A.2d 600 (1958) [parking lot]; Liney v. Chestnut Motors, Inc., 421 Pa. 26, 218 A.2d 336 (1966); Kalberg v. Anderson Bros. Motor Co., 251 Minn. 458, 88 N.W.2d 197 (1958) [parking lot]; Lotito v. Kyridkers, 272 App. Div. 635, 74 N.Y.S.2d 599 (1947), appeal dismissed, 297 N.Y. 1027, 80 N.E.2d 542 (1948); McAllister v. Driever, 318 F.2d 513 (C.A. 4, 1963); Young v. Costner Eagleton Motors, Inc., 379 S.W.2d 785 (Tenn. 1964).

"Many cases hold that the theft of an automobile and subsequent negligent operation thereof, were not reasonably foreseeable risks of leaving a car, unattended with the key in the ignition; that everyone is justified in assuming that everyone else would obey the laws and that it is not reasonable to be anticipated that a car will be stolen and later operated negligently. Other cases point out that, although parking a car at certain places and under certain circumstances, might be negligent and the theft of the car reasonably foreseen, nevertheless, the tortious acts of the thief, occurring after the flight had terminated, are held to be the [sole] proximate cause of the injury."

In concluding, the Court stated at pages 152 and 153:

"In the instant case the evidence indicates that the flight of the thieves at the time of the collision resulting in plaintiffs' injuries had terminated. Ordinarily this question, as well as the question whether defendant, when he left his car parked where he did, under the circumstances as then existed, unattended, unlocked, and with the key in the ignition, was negligent, and the question whether the theft of the car, and the subsequent events, were foreseeable and the proximate cause of plaintiffs' injuries, were all questions of fact. We agree, however, with the finding of the trial court to the effect that leaving this car unlocked, and with the key in the ignition, may have been a contributing reason for the theft of defendant's car, but it was not the proximate cause of plaintiffs' injuries, which thereafter resulted from the tortious operation of defendant's car by the thieves."

A few cases rely upon sections 448 and 449 of the Restatement of Torts which provide that, although a superseding wilful and criminal act shields the party, whose negligence afforded the opportunity to commit the crime, from liability, that party may be liable if he should have realized that the third party might avail himself of the opportunity to commit such a crime. Reliance upon this section is mis-

placed, however, for its application is based upon the premise that the injury results directly from the wilful and criminal act, as where a shopowner negligently sells a gun to a minor. The Pennsylvania Superior Court points out this distinction in *Farley v. Sley System Garages*, 187 Pa. Super. 243, 144 A.2d 600 (1958). There the Court held that when a vehicle is stolen from a parking lot, the operator should anticipate that a vehicle will be stolen if he is negligent, but he cannot anticipate all the harm which the thief may cause with the aid of a vehicle from the parking lot. (p. 605, 144 A.2d:)

> "It is fundamental that one is not to be held liable for all possible consequences, but only for probable consequences. * * * It is conceded as indeed it must be that the injury was a possible consequence of the theft. But it is no more probable than the consequence that the thief would drive carefully so as not to attract attention."

There is no contention here nor could it be reasonably inferred that the thief was in "flight" over a day after the theft and only 12 blocks away. Hence under the rationale of any of the decisions from the various jurisdictions discussed and more particularly, in light of the *Howard* and *Casey* cases in this Court, the negligence of Colonial could not be a proximate cause of the injuries to Morley.

CONCLUSION

As both negligence and proximate cause must be proved for plaintiff to recover and as evidence on the latter element was totally lacking under the accepted definition of proximate cause, the Court below erred in failing to grant appellant's timely motion for judgment notwithstanding the verdict and accordingly, the judgment below should be reversed and judgment entered for appellant.

Respectfully submitted,

CHARLES E. PLEDGER, JR.
JOHN F. MAHONEY, JR.
JAMES C. EASTMAN

925 Washington Building
Washington, D. C. 20005

Attorneys for Appellant

CONTENTS OF JOINT APPENDIX

JOINT APPENDIX

[Filed July 31, 1963]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN J. MORLEY
1732 Lamont Street, N.W.
Washington, D. C.
Plaintiff

v.

COLONIAL PARKING, INC.
A Body Corporate
2140 Pennsylvania Avenue, N.W.
Washington, D. C.

serve: Rene M. Bischoff
Resident Agent
2013 New Hampshire Ave., N.W.
Washington, D. C.

and

MARY ANN CLAPPER
2440 - 16th Street, N.W.
Washington, D. C.

and

THOMAS CHACHO
3714 - 37th Street
Mt. Rainier, Maryland

serve: c/o World Health Organization
1501 New Hampshire Ave., N.W.
Washington, D. C.

Defendants

Civil Action
No. 1946-63

COMPLAINT FOR PERSONAL INJURIES

The plaintiff, John J. Morley, respectfully represents to this Honorable Court as follows:

1. That he is an adult citizen of the United States and a resident of the District of Columbia and brings this suit in his own right.

2. That the defendant, Colonial Parking, Inc., is a body corporate, incorporated in the State of Maryland, and engaged in the operation of auto parking lots in the District of Columbia. The defendant, Mary Ann Clapper, is an adult citizen of the United States and a resident of the District of Columbia. The defendant, Thomas Chacho, is an adult citizen of the United States and a resident of the State of Maryland. The defendants are sued jointly and severally.

3. This Honorable Court has jurisdiction on the grounds of diversity of citizenship and the amount involved exceeding the sum of Ten Thousand Dollars ($10,000.00).

4. On or about the 17th day of May, 1963, the defendant, Mary Ann Clapper, was the owner and operator of a motor vehicle then and there proceeding upon the streets and highways of the District of Columbia. On the same date and occasion, the defendant, Thomas Chacho, was the owner of a motor vehicle, which, upon information and belief, the plaintiff states, was being operated by one Willie Sheler then and there proceeding upon the streets and highways of the District of Columbia.

5. On information and belief, the plaintiff alleges that on the date aforementioned, the defendant, Colonial Parking, Inc., was the operator of a parking lot in the District of Columbia, on which the defendant, Thomas Chacho's motor vehicle had been parked with permission and agreement of the said defendant, Colonial Parking, Inc. The defendant, Colonial Parking, Inc., did, through its agents and employees, negligently permit said motor vehicle to be removed from its custody and control, and did negligently release said motor vehicle, and permit said motor vehicle to be withdrawn from its custody by a person or persons other than the defendant, Thomas Chacho.

6. That as a result of the joint, several,and concurrent negligence of the defendants and each of them individually, or through their agents, employees, and operator, the vehicle owned by the defendant, Thomas Chacho, operated by one Willie Sheler, and the vehicle owned and operated

by the defendant, Mary Ann Clapper, did both collide with plaintiff, John J. Morley, inflicting serious and permanent injuries to the said plaintiff.

7. That the plaintiff sustained severe injuries to his back, legs and other portions of his body, including a comminuted fracture of the left leg, severe cerebral concussion, laterations and scarring to his face and head, severe bruising and contusions to the body and extremeties, as well as other injuries, some of which are permanent in nature. The plaintiff was confined in the hospital for a long period of time and has been incapacitated from engaging in his normal employment and activities since his original injuries. The plaintiff has been obliged to remain under constant medical care and will be obliged to remain under medical care for an indefinite period of time in the future. The plaintiff has experienced great pain and suffering, and will likely continue to experience pain and suffering, as well as limitations and disability, resulting from the injuries as aforesaid. The plaintiff has sustained financial losses, expenses, and damages as a result of the aforesaid injuries and will likely continue to sustain such losses, expenses, and damages for an indefinite period of time in the future.

8. That all of the injuries, damages, and losses sustained by the plaintiff as aforesaid are the sole result of the joint, several, and concurrent negligence of the defendants.

WHEREFORE, the premises considered, the plaintiff brings this action and claims of the defendants jointly and severally the sum of Two Hundred Thousand Dollars ($200,000.00).

HARRY W. GOLDBERG
MORRIS ALTMAN
1511 K Street, N.W.
Washington 5, D. C.
Attorneys for Plaintiff

2. That the defendant, Colonial Parking, Inc., is a body corporate, incorporated in the State of Maryland, and engaged in the operation of auto parking lots in the District of Columbia. The defendant, Mary Ann Clapper, is an adult citizen of the United States and a resident of the District of Columbia. The defendant, Thomas Chacho, is an adult citizen of the United States and a resident of the State of Maryland. The defendants are sued jointly and severally.

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8. That all of the injuries, damages, and losses sustained by the plaintiff as aforesaid are the sole result of the joint, several, and concurrent negligence of the defendants.

WHEREFORE, the premises considered, the plaintiff brings this action and claims of the defendants jointly and severally the sum of Two Hundred Thousand Dollars ($200,000.00).

HARRY W. GOLDBERG
MORRIS ALTMAN
1511 K Street, N.W.
Washington 5, D. C.
Attorneys for Plaintiff

JURY DEMAND

Plaintiff demands trial by jury on every issue triable by jury.

HARRY W. GOLDBERG

[Filed Sept. 10, 1963]

ANSWER OF DEFENDANT COLONIAL PARKING, INC. TO COMPLAINT AND CROSS-CLAIM AGAINST DEFENDANT MARY ANN CLAPPER

First Defense

The complaint fails to state a claim against defendant Colonial Parking, Inc. upon which relief can be granted.

Second Defense

This defendant admits that it is engaged in operating parking lots in the District of Columbia and that on the date alleged in paragraph 4 a vehicle owned by defendant Thomas Chacho had been parked on this defendant's lot; denies that it was negligent in any of the respects alleged and avers that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the complaint.

CROSS-CLAIM OF DEFENDANT COLONIAL PARKING, INC. AGAINST DEFENDANT MARY ANN CLAPPER

1. Plaintiff avers in the complaint, *inter alia*, that defendant Mary Ann Clapper owned and operated her vehicle in a negligent manner and by reason of the concurrent negligence of this defendant and defendant Colonial Parking, Inc. plaintiff was injured.

2. If these contentions are sustained and a joint judgment is rendered in favor of plaintiff against defendants Colonial Parking, Inc. and Mary Ann Clapper, then, in that event, Colonial Parking, Inc. claims the right of contribution from defendant Mary Ann Clapper for all sums rendered in favor of him.

WHEREFORE, Colonial Parking, Inc. demands judgment from defendant Mary Ann Clapper for all or a proper contributable portion of any judgment rendered in favor of plaintiff against it.

PLEDGER & EDGERTON

By John F. Mahoney, Jr.
925 Washington Building
Washington 5, D. C.
Attorneys for defendant
Colonial Parking, Inc.

Service of a copy of the foregoing answer of defendant Colonial Parking, Inc. to complaint and cross-claim against defendant Mary Ann Clapper was made upon Harry W. Goldberg, Esq. and Morris Altman, Esq., attorneys for plaintiff, 1511 K Street, N.W., Washington 5, D. C.; Swingle, Mann & O'Brien, attorneys for defendant Mary Ann Clapper, Colorado Building, Washington 5, D. C.; and Collins & Anderson, attorneys for defendant Thomas Chacho, Mills Building, Washington 6, D. C., by mailing a copy thereof to them at the addresses indicated, postage prepaid, this 9th day of September, 1963.

JOHN F. MAHONEY, JR.

[Filed, April 19, 1966]

PRETRIAL PROCEEDINGS

April 19, 1966

Action for damages for personal injuries, due to negligence.

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF FACTS AND STIPULATE THERETO: D Colonial Parking, Inc. is the operator of a parking lot at 1721 Corcoran St., NW, DC. On May 16, 1963, D Thomas Chacho drove his auto on this D's lot at about 8 a.m. At that time he was a monthly parker and displayed a sticker on his auto to this effect. His car was parked by the attendant. Some time between 8 a.m. and 6 p.m. on the date aforesaid, Mr. Chacho's auto was removed from this D's lot. Some time between 8 and 8:30 p.m. on May 17, 1963, the Chacho vehicle was involved in a coll. with the P, a police officer, who was on duty directing traffic on 16th St., NW, in front of the Mexican embassy (2829 - 16th St., NW, DC). The vehicle was being driven south by one Willie Sheler, following which a northbound vehicle being operated by Mary Ann Clapper Ott was involved in a coll. with the P (it is agreed that Mary Ann Clapper, named as D, has married Mr. Roy Ott, and the pleadings in this case may be amended to describe her as Mary Ann Ott).

P CLAIMS that his accidents, injuries and damages were caused by the negl of and viol of DC traffic regs by the Ds. His specific allegations as to Ds' negl, viol of traffic regs, his injuries and special damages are set out in a statement which is attached hereto, made a part hereof and incorporated herein by reference marked "A".

D COLONIAL PARKING asserts that Mr. Chacho's auto was stolen from its lot and that at the time of the original coll. with the P it was being driven by Willie Sheler, who had escaped from St. Elizabeth's Hosp. Its defenses are as follows: D denies all allegations of negl; the accident was caused by the sole negl of one Willie Sheler who had stolen

the car the day before from this D's lot; this D avers that the P was guilty of contributory negl in standing in the middle of a heavily trafficked street without giving proper warning of his presence.

CROSSCLAIM OF D COLONIAL PARKING AGAINST D MARY ANN CLAPPER: This D avers that if the allegations in the complaint are sustained and D Mary Ann Clapper Ott is found guilty of negligent operation of her vehicle, then it claims the right of contribution in the event of a joint judgment in favor of P.

D MARY ANN OTT in support of her cross claims against Ds Chacho and Colonial Parking, Inc., and in defense of the claims of the P and in defense of the cross-claim of Colonial Parking, Inc. against her, denies all allegations of negl charged against her. She further says that such injuries, losses and damages as may have been sustained by P were the result of the sole negl or contributory negl of the P or the sole negl or contributory negl of the co-Ds, Colonial Parking, Inc. and Thomas Chacho or that of Willie Sheler, the operator of the vehicle owned by Chacho which struck the P and threw him into the path of this D's auto. This D further says the accident was the result of a sudden emergency or an unavoidable accident.

The negl of P consisted of placing himself in a position of peril without taking proper measures, considering weather conditions, to make his presence known in the street to pass automobilists and to otherwise keep a proper lookout for his own safety.

The negl of the D Colonial Parking, Inc. consisted of failing to take proper measures for the protection of the bailed auto of the D Chacho and negligently allowing the unauthorized removal of said auto from its custody. It was further negligent in not having an attendant on its parking lot at all times during the day of this occurrence which dereliction of duty permitted the auto of Chacho to be removed from the lot by an unauthorized person.

The negl of the D Chacho consisted of his leaving his car on the lot of Colonial Parking, Inc. with the keys in the ignition when he knew or should have known that the parking lot had on previous occasions been left unattended and unprotected.

D THOMAS CHACHO in defense of the claims of the P and the crossclaims of Mary Ann Ott denies that the person operating his vehicle at the time of the accident was his agent, servant or employee; denies consent or permission was given to the alleged driver and denies all allegations of negl, or viol of traffic regs.

D Chacho further avers that any alleged injury and damages to P were the result of his sole and/or contributory negl adopting the allegations of co-D in these respects.

As to the cross-claim asserted by the D Ott, D Chacho denies all allegations of negl; denies the cross-claimant is entitled to contribution or indemnification.

STIPULATIONS

Witnesses known to Colonial Parking: Pvts. James E. Sprowls, Paul D. Oliver and Gary A. Curtis, of Metropolitan Police Dept., O'Dell Artis, 3714 - 37th St., Mt. Rainier, Md., Representative from Colonial Parking, Inc., Willie Sheler, c/o St. Elizabeth's Hosp.

The parties agree to file with the Clerk of the Crt and to mutually exchange, on or before May 14, 1966, a list of the names and addresses of any witnesses known to them including medical and expert witnesses, other than those listed herein, who have knowledge of any aspect of this case, indicating those who may be used at trial. Impeachment witnesses are not to be included.

The parties agree to the mutual exchange of all medical reports of examining or treating physicians, now in hand, on or before May 14, 1966, and a similar exchange of all other such reports within 48 hours of the alert of this case for trial.

The following may be admitted in evidence without formal proof subject to all legal objections: x-ray plates, HEW mortality tables; hosp records re P; DC traffic regs of which counsel advises clerk of crt and opposing counsel in writing on or before May 14, 1966; bills initialed by counsel for all parties or Examiner;

Counsel for P agrees to make the P available for the purpose of a physical exam by physician of Ds' choice before, but not to interfere with, trial.

Counsel for Ds assert that the P was involved in an altercation or arrest of a prisoner at a time subsequent to the accidents about which this case is concerned. They desire to and may take the depositions of the P and any witnesses to said altercation or arrest provided no delay in trial of case results therefrom.

Counsel for P shall furnish the clerk of crt and opposing counsel within 48 hours of the written alert of this case for trial with a written itemized statement of any medical and hosp bills or other special damages not listed herein which will be introduced at the trial, either actual or estimated.

The Examiner has requested counsel for the parties to appear at trial with the maximum amt of authority to settle this case which will be allowed them by their principals.

Pretrial Examiner

TRIAL COUNSEL:

HARRY W. GOLDBERG, Esq. for P
JOHN MAHONEY, Esq. for Colonial
FRANCIS X. QUINN, Esq. for Chacho
ALLAN C. SWINGLE, Esq. for Ott

EXCERPTS FROM THE PROCEEDINGS
February 8-13, 1967

[1] JOHN J. MORLEY

DIRECT EXAMINATION BY MR. GOLDBERG:

Q. Will you state your name and address? A. John Joseph Morley, 16 Shorewalk, Reaver, Maryland

* * *

[2] Q. Were you employed at the time of this particular incident which occurred on May 17, 1963? A. Yes, sir.

Q. What was the nature of your employment at that time? A. I was patrolman for the Metropolitan Police Department.

Q. How long had you been employed by the Police Department as of May 17, 1963? A. Approximately five months.

* * *

[4] Q. We are inquiring today about an accident which occurred on the 17th day of May in the year 1963. Do you recall being involved in an accident on that particular day? A. Yes, sir.

Q. Were you working that day as a patrolman? A. Yes, sir.

Q. Do you recall what time you had gone to work? A. 4:30 p.m. roll call, sir.

Q. What would be your hours of duty when you report for roll call at 4:30? A. 5 p.m. to 1 a.m.

Q. When you reported for duty on that day, where did [5] you start work? A. I had what was called the embassy beat, Tenth Precinct.

Q. Can you tell us whether you walked a beat that day at all? A. Yes, sir.

Q. What hours did you patrol a beat? A. From 5 o'clock until approximately the time I reported to the Mexican Embassy.

Q. What time was that? A. 8 o'clock that night.

Q. When did you get your instructions to report to the embassy? A. At roll call, sir.

Q. What were those instructions? A. We were instructed

to meet the sergeant in front of the Mexican Embassy at 8 o'clock.

Q. Were you told at roll call any specific duties were being assigned to you at the embassy? A. No, sir.

Q. When you got to the embassy, what did you find going on there? A. I found there was a reception for President Johnson who was then Vice President of the United States.

Q. Did you report to any particular individual at the embassy? [6] A. Yes.

Q. To whom? A. Sergeant Glen Anderson of the Tenth Precinct.

Q. When you reported to Sergeant Anderson did he assign any particular duties to you at that time? A. Yes, he told me to go to the north entrance of the driveway to the dividing line of Sixteenth Street to assist with the outflow of traffic from the driveway.

Q. Are you able to describe on what side of the street the embassy was located to Sixteenth Street? A. The embassy is on the east side of the 2800 block of Sixteenth Street, which is between Fuller and Harvard Streets, Northwest.

Q. Can you tell us what type of driveway existed at the embassy at that particular time? A. It was a semi-circle driveway.

Q. Was there one particular portion used for entrance and another for exit? A. On this particular evening we were using the south as the entrance and the north as the exit.

Q. How soon after arriving did you take up a position at the north exitway of the driveway? A. I would say two or three minutes, sir.

Q. Was there some other police officer who was [7] stationed at the south entrance to the driveway? A. Yes, sir.

Q. Do you recall who that was? A. Officer James Sprowls, sir.

Q. Can you tell us how Sixteenth Street was divided for north and south traffic? A. It had two northbound lanes, three southbound lanes, at that particular spot.

Q. Was there any demarcation of those north and southbound lanes? A. You are referring to a mark dividing them?

Q. Yes. A. There was a solid line dividing them.

Q. How many lines did we have northbound? A. Two.

Q. And southbound? A. Three.

Q. Where were you stationed with relation to the lines separating north and southbound traffic? A. Directly on it.

Q. Where were you stationed while directing traffic with respect to the north exitway from the Mexican Embassy? A. Probably approximately two or three feet north of the exit so as not to interfere with traffic coming out and going south.

[8] Q. How were you dressed that evening when you came to the embassy and started to direct traffic? A. I had a raincoat on, sir.

Q. Were you wearing a hat? A. Yes, sir.

Q. Was it a rainhat? A. I had a hood over the hat, a rainhood.

Q. What was the condition of the weather at the time you continued to start to direct traffic? A. It was drizzling.

Q. Did it remain drizzling as you started to direct traffic? A. Yes.

Q. What was the condition of the light? Was it day or evening? What was the lighting situation? A. It was dusk.

Q. Do you know whether there was any street lighting on at the time you started to direct traffic? A. Yes.

Q. Can you tell us, sir, with relation to the Mexican Embassy and from where you were standing where the street lights were located? A. There was one on the west side of Sixteenth Street directly opposite me and one just south of me on the east side of Sixteenth Street.

[9] Q. What was the condition of lighting at the entrance to the embassy if you remember? A. If I remember correctly, it was well lit due to parties going in.

Q. Officer Morley, while you were stationed at this particular point, what duties did you perform? A. My main purpose was when a car was coming out of the embassy and wanted to go south, it would be to halt the southbound traffic to permit this car to do so.

Q. Suppose traffic coming out of the embassy wanted to go north, what, if anything, would you do? A. I would wait until Officer Sprowls stopped the northbound traffic and let the car coming out of the embassy go north.

Q. Were you using anything to assist you in directing traffic as you stood there on that particular evening? A. Yes, sir, I had a flashlight.

Q. Was the light on? A. Yes.

Q. Can you describe the flashlight? A. It was a small rectangular flashlight I would say about three inches long and an inch wide. It was purchased at Joe Phillips Police Equipment on Sixth Street, Northwest.

Q. Is this the type of flashlight normally used by policemen in directing traffic? [10] A. A lot of policemen do use this particular type.

Q. What type of a beam did it cast? A. It cast a rectangular beam, a very bright beam.

Q. In what manner would you use this flashlight in directing traffic? A. Waving it on the pavement, directing the beam toward the pavement but waving it out so all traffic could see it, depending on which way I wanted the traffic to go.

Q. If you wanted traffic to halt, in what manner would you use the beam? A. By waving it from east to west or west to east in a cross in front of the traffic.

Q. So, when you wish traffic to move forward, how would you use it? A. North and south.

Q. Are you able to tell us how long you were directing traffic prior to the time that you were injured? A. I would say approximately 20 to 25 minutes.

Q. Did you remove yourself from your position in the center on the dividing line during that period of time? A. No, sir.

Q. Now, did there come a time, Officer Morley, that you were injured while directing traffic on that particular evening? A. Yes, sir.

[11] Q. What happened to you? A. I really do not know, sir. I woke up when it was all over.

Q. What is the last thing that you recall before you woke? A. My memory is not clear. The last thing I recall I was beginning to stop—I was in the process of stopping the southbound traffic.

Q. Do you know where you were standing before you lost track of what happened? A. Yes, sir, just north of the exit.

Q. Where were you standing with relation to that white line? A. On it.

Q. What is the first thing that you remember after being on the white line directing traffic? A. I woke up laying on the street and I heard somebody say a policeman got hit, at which time I tried to get up and go help them, at which time the policeman on the scene told me to lay down because it was me. I felt no pain at that time.

* * *

[4] CROSS EXAMINATION

BY MR. MAHONEY:

Q. Mr. Morley, directing your attention to the date of the accident, you testified that it occurred about 8:30 p.m.? A. Yes, sir.

Q. Was it drizzling at the time? A. Yes, sir.

Q. Did you say it was dusk? A. Yes, sir.

Q. Did you notice as the cars were going by you whether the windshield wipers were operating? A. Yes, sir.

Q. What were you wearing at the time? A. A raincoat, sir.

Q. What color was it? A. Black, sir.

Q. Did you have a hat on? A. Yes, sir.

Q. What color? A. Black, sir.

Q. Did you have any orange on at the time? A. No, sir.

Q. By that I mean a jacket you sometimes see the officers wear over their uniform. A. No, sir.

[5] Q. Did you have any white markings on your uniform? A. No, sir.

Q. You indicated by the "X" that you were standing in that position at the time you were struck, is that correct? A. I believe so, sir.

Q. Were you facing the embassy or facing south? A. At the time I was struck, sir?

Q. Yes. A. I really cannot say that I remember.

Q. As you were directing traffic, did you ever turn to face vehicles approaching you from the northbound section? A. Yes, sir, when directing traffic you constantly turn.

Q. That is when you move your flashlight crossways or up and down? A. Yes, sir.

Q. Did you ever see the first vehicle that struck you? A. No, sir.

* * *

[1] PRIVATE JAMES E. SPROWLS

* * *

DIRECT EXAMINATION

BY MR. GOLDBERG:

Q. Officer, will you state your name and assignment? A. James E. Sprowls. I am assigned to the Special Operation Tactical Force.

Q. You are with the Metropolitan Police Department of the District of Columbia? A. Yes, I am.

Q. How long have you been employed by the Police Department? A. Four years.

Q. Officer Sprowls, were you so employed on the evening of May 17, 1963? A. Yes.

Q. Do you recall being assigned in the area of the Mexican Embassy on the evening of May 17, 1963? A. Yes.

Q. Now, Officer Sprowls, what were you doing at the Mexican Embassy on that particular evening? [2] A. We were detailed there as a traffic detail to assist vehicles coming and leaving the embassy for a reception.

Q. Are you able to tell us where you were posted at the time you were performing your duties and assisting the traffic? A. Yes, I was in the center dividing strip of Sixteenth Street at the south entrance to the driveway of the embassy.

Q. While you were directing traffic at the south entrance, do you know or do you recall who was at the north, if there was someone at the north entrance or exit? A. Yes, I do.

Q. Who was that? A. Mr. Morley.

Q. While you were directing traffic at the south entrance

and he at the north, did there come a time that anything unusual occurred to Officer Morley? A. Yes, it did.

Q. Can you tell us what you observed? A. I was standing facing the west curb stopping the traffic that was flowing north and I turned and looked north to see what Officer Morley was doing in regard to his traffic that was coming south. And as I turned to look at him I saw the car coming south on Sixteenth Street straddling the center dividing line—the line he was standing on directing traffic.

Q. What then happened? [3] A. The vehicle straddling the line struck Officer Morley and I saw it knock him into the curb on the east side of the line.

* * *

THE WITNESS: I saw the officer go through the air in the direction of the east curb. He fell in the lane of traffic.

BY MR. GOLDBERG:

Q. What happened then with the southbound vehicle that struck him? A. It proceeded on south but slowed down and as it came to where I was standing it was still slightly on the wrong side of the street I should say. I put my hand on the front fender, slapped my hands down on the fender just as he was almost to a stop. He stopped. I placed my hands on the window of the driver's door.

Q. Officer Sprowls, how far in distance, if you are able to tell us, did this vehicle travel from the point that it struck Officer Morley to the point where you placed your hands on its front fender? A. Approximately 45 to 55 feet, three or four cars.

[4] Q. Now, at the time that you placed your hands on its fender, did you say anything or do anything? A. I said, "You know you just struck the officer up there."

Q. Did you thereafter look north again? A. Yes, I did. As I said that I pointed north and looked up in that direction at the officer.

Q. What, if anything, did you observe as you looked north at that time? A. I saw that the traffic that was in the northbound lane was going to go over the officer.

Q. Did you see a vehicle northbound at that time? A. Yes, I did.

Q. And where was that vehicle with relation to where Mr. Morley, how far south of Mr. Morley was that vehicle at that time? A. To the best of my knowledge about five or ten feet.

Q. Was that vehicle moving? A. Yes, it was.

Q. What did you then observe? A. I saw that the first vehicle nearest Officer Morley was passing over him and I realized that the other vehicles were moving at the same speed in the same direction, they would also do the same.

Q. What did you then do? [5] A. I took my attention and tried to stop the flow of northbound traffic and turned my back on the vehicle to stop them.

Q. Are you able to tell us how far past Officer Morley the vehicle which ran over him proceeded until it stopped? A. I know that I could not say to my knowledge how many feet it was. But I know she stopped within my sight, I would say within less than 50 feet.

Q. Did you remain at the point where you had stopped the car, the southbound car, while you were stopping northbound traffic, or had you gone forward to stop northbound traffic after observing the vehicle going over Officer Morley? A. I moved from about where I was standing on the center line just over and up a few feet to where the cars are where Sixteenth Street would be written there on the map. I probably ran that distance trying to stop the cars and then I realized the other officers moved off the curb.

Q. Are you indicating that you went north to about midway to between the north and south entrances to the driveway? A. Yes, I did.

Q. Did you ever get any closer to Officer Morley than that point at that time? A. Yes, I did. Just before, we, other officers and I, jumped into a car. I went up and saw Officer Morley lying there.

[6] Q. What did you then do? After that, did you and another officer get into a car? A. Yes, we stopped the first auto we saw that we were able to stop coming out on Sixteenth Street.

Q. Who was the other officer who went into the car with you? A. Private Carew, now Sergeant.

Q. After you left the southbound car having viewed this northbound vehicle approaching Officer Morley's body, did you observe what happened to the southbound vehicle before you commandeered a car? A. Yes, immediately after I directed my attention to Officer Morley, just turned my head away from its view, he proceeded south on Sixteenth Street, the highway street.

Q. Now, as you were directing traffic at the south entrance to the embassy and looked north, did you have any difficulty in seeing Officer Morley as he directed traffic at the north end? A. No, I did not. As a matter of fact, we were directing traffic by coordinating it with one another.

Q. Did you have any difficulty in seeing the collision which occurred between the southbound vehicle and Mr. Morley? A. No, sir.

Q. Did you have any difficulty in seeing Officer Morley as he lay in the northbound lane immediately after the collision? [7] A. No, sir.

Q. Was he visible to you? A. Yes, sir.

Q. Did you at any time thereafter return to the scene after pursuing the vehicle? A. Yes, I did.

Q. And did you ever speak with the lady who was operating the vehicle northbound that had run over Officer Morley? A. No, sir, I did not talk to her directly. I saw her at the precinct later, but I had no conversation with her.

* * *

CROSS EXAMINATION

BY MR. MAHONEY:

Q. After you put your hands on the fender of this vehicle and told the operator that it had just run over an officer, did he make any response to you? A. No. Well, when I first put my hand on his fender, he was just about stopped, not quite. I slapped my hand on his fender.

Q. Would this be around this area I am pointing to now? A. In the center line of the street.

Q. Over here? A. Yes.

Q. Where was the entrance to the driveway? A. The south.

[8] Q. Right here (indicating)? This is where you stopped him? A. Yes.

Q. What happened after you stopped him? What did you do? A. He was almost stopped as I slapped his fender. I still went a few more feet. I put my hand on the driver's door window and I stated, "You just ran over that policeman."

Q. What did he do then? A. He just looked at me, and as I turned my head he drove off.

Q. Did you go after him? A. Not immediately. I did eventually.

Q. Did you then go to attend to Officer Morley? A. Yes.

Q. Was this car eventually apprehended or the operator and the car? A. Yes.

Q. Do you know where it was found? A. I am not certain of the exact address now. It was in the rear of an address I believe they recovered a car.

It was off Kalorama Road, 16 or 17 hundred block. I am not certain.

Q. Do you know when it was found? A. Possibly 15 minutes at the very most after the [9] accident.

* * *

[The following Stipulation was read to the jury.]

The motor vehicle owned by Thomas Chacho was stolen on May 16, 1963 by one Willie Sheler of 1414 Girard Street, N.W., Washington, D.C. from a parking lot operated by Colonial Parking, Inc. at 1721 Corcoran Street, N.W., Washington, D.C. At about 8:30 p.m. on May 17, 1963 while operating the stolen vehicle southbound in the 2700 block of 16th Street, N.W., Washington, D.C., Willie Sheler struck and injured the plaintiff John J. Morley. The distance between the aforesaid parking lot and the place of the accident is about twelve city blocks.

* * *

[1] MR. MAHONEY: May it please the Court, the defendant, Colonial Parking, Incorporated, moves the Court for a directed verdict now that the plaintiff has concluded his case on liability.

(Off the record.)

THE COURT: This might be a good time to recess for lunch. I think since you have your doctor here we will have him first and then we will go back to the motion.

(The Court was recessed at 12:30 p.m. to return at 1:45 p.m., the same day.)

1:45 p.m.

(Testimony was taken of Dr. Thomas M. Foley.)

3:40 p.m.

(At the bench.)

THE COURT: I have before me both motions we had from defendants, motions for directed verdict. I have not heard you fully, Mr. Swingle.

(Colloquy followed.)

3:50 p.m.

MR. MAHONEY: I was going to ask Your Honor whether he denied the motion for a directed verdict or has reserved ruling on it.

THE COURT: I am going to deny both of them at this time. But I do it without prejudice to them being renewed.

February 13, 1967 - 10:00 a.m.

[2] MR. MAHONEY: At the conclusion of the trial on Friday Your Honor suggested if there are further cases that we could bring them to your attention.

THE COURT: Yes, sir, proceed.

(Off the record.)

MR. MAHONEY: I rest on my motion for a directed verdict.

(Testimony was taken of Mary Ann Otts.)

10:45 a.m.

THE COURT: Both sides now rest.

MR. MAHONEY: Would Your Honor hear a motion at this time before the prayers are considered?

THE COURT: Yes.

MR. MAHONEY: The defendant, Colonial Parking, Incorporated, moves again for a directed verdict in favor of this defendant.

(Off the record.)

THE COURT: I deny both the motions at this time. I am conscious it is close. I think the proper course is to let it go to the jury. If you gentlemen feel disposed afterward, you can raise the question again.

* * *

EXCERPTS FROM THE DEPOSITION OF THOMAS CHACHO
December 5, 1963

[3] BY MR. GOLDBERG:

Q. Will you please state your name and address. A. Thomas Chacho, 3714 - 37th Street, Mount Rainier, Maryland.

Q. What is your occupation and where are you employed? A. Personnel officer at the World Health Organization.

Q. The address, please? A. 1501 New Hampshire Avenue, Northwest.

Q. How long have you been employed and working at that particular address? A. Since 1958 at that address and since 1950 with the organization.

Q. Mr. Chacho, do you own and operate a motor vehicle? A. Yes, I do.

Q. Did you own and operate a motor vehicle in May of 1963? A. Yes, I did.

Q. Specifically on or about May 17, 1963, can you tell us [4] the type and make of an automobile that you owned and operated at that time? A. A 1963 blue Rambler station wagon.

Q. Was that a 1963 model? A. Yes.

Q. Now, did you drive to and from work, sir? A. Yes.

Q. Were your business hours such that you had a car parked during the day while you were on your job? A. Yes.

Q. Did you use a car in your work, that is to say, coming and going? A. Just coming and going to work.

Q. Where did you park your car specifically during the month of May 1963? A. At Colonial Parking lot, 1721, I believe, Corcoran Street.

Q. How long had you been parking your car at the Colonial Parking lot? A. Several months.

Q. How had you first happened to begin parking it there? A. Parking on the street is quite difficult up there and the lot was inexpensive for monthly customers and so I, having a [5] new car and not wanting to park it on the street, chose to park it on the lot.

Q. Did they have some kind of sign that aroused your interest in parking there? A. The amount, yes, $11 a month.

Q. Was that published in the form of a sign on the lot? A. I believe it was.

Q. Now, specifically can you tell us where this lot was located? A. 1721 Corcoran Street.

Q. Is it a large lot? A. Fairly large.

Q. Could you approximate the width of the lot on the street? A. I would say it is about 40 feet long and about equally as wide. I would assume it would accommodate from 75 to a hundred cars.

Q. Did it have a little house of some sort where an attendant or attendants regularly could be found? A. Yes.

Q. When you first began parking there, did you enter into a monthly contract agreement? A. Immediately upon parking there. The first several [6] days I didn't because I went there in the middle of a month, or, you know, after the first of the month, and started the following month on a full monthly contract.

Q. What was your agreement with Colonial Parking? A. I don't remember the details of it. All I know the amount was $11 per month.

Q. How many days per week were you permitted to park on the lot for that sum? A. I don't recall if there was a limitation on the days, but I parked there generally five days a week.

Q. Were you entitled to park there at least every week day? A. Yes.

Q. What was the procedure in so far as how you effected getting your car parked was concerned? A. Well, I would pull up onto the lot on the Corcoran Street side and leave my car for the attendant and he would take the car and park it.

Q. So you did not actually put your car into a parking place? A. No.

Q. Now, was it the procedure then for the attendant to take possession of the car once you drove it onto the lot? [7] A. Yes.

Q. And in so far as parking it or retrieving it, when you left work was that done by the attendant? A. Most of the time the attendant retrieved the car but many occasions I retrieved it myself.

Q. Was the same attendant always in charge of the lot during the entire time that you parked there up until May 17th of 1963? A. As far as I can recall, yes, unless he was sick or something a day or so. Only if he were sick would somebody else be in charge of the lot.

Q. How many attendants were there on the lot usually in the morning when you were bringing your car in? A. One attendant.

Q. Was there ever more than one attendant there to help accommodate the customers in the morning? A. Not to my knowledge.

Q. How about in the evening when you went to pick your car up? A. One attendant.

Q. Now, under your arrangement did you have what are called in-and-out privileges, that is to say, you could take your car out during the day and return it later in the day if [8] you happened to be on an errand of some sort and were going back to work? A. I imagine that they do have that privilege but I infrequently used it.

Q. You have occasionally used it? A. On occasion I have.

Q. No objection on their part to your doing it, as far as you can remember? A. No.

Q. In so far as leaving your keys in the car was concerned, what requirements did the Colonial Parking Company make of you in this regard? A. I said I don't remember what the initial terms of the contract were, but normal procedure in almost all parking lots that have an attendant is to leave the key with the attendant.

Q. Well, let me put it this way. Under your arrangement of bringing the car onto the lot and leaving it, was it possible for you to leave the switch on and leave the car without a key so it could be operated by the attendant? A. I wouldn't trust it that way.

Q. Well, did you always leave the key in the car? A. I always left the key.

[9] Q. Did the attendants ever tell you that you could lock your car and take the key? A. No, he didn't. In fact, one time I did ask did he want me to leave the key and he said yes.

Q. And thereafter you uniformly left the key? A. Yes.

Q. Now, would it be your best recollection, sir, that except for possibly one or two days that the same attendant took care of your car during the entire time that you were parking there from the beginning until, shall we say, May 17, 1963? A. Yes.

Q. Would it be a fair statement, this attendant knew you or got to know you? A. I would say he knew me quite well. He even knew my account number, which I don't know.

Q. He knew your account number? A. Yes.

Q. And how would you be aware that he knew your account number? A. It is on the sticker that appears on the windshield.

Q. Would you pay the attendant monthly? A. No. I paid Colonial Parking direct.

[10] Q. Do you pay in advance or do you pay at the end of the month after the service is rendered? A. Pay in advance.

Q. Now, had you paid in advance for the month of May 1962 [1963]? A. I'm sure I had.

Q. Now, normally when you came to get your car in the evening, how would you make your presence known and the desire on your part to get your car? A. I would always go in front of the little house that the attendant would—that he has there on the premise.

Q. Would you speak with him? A. Either speak to him or let him know that I was there to get the car.

Q. Then what would he normally do? A. Either he would retrieve it or I would.

Q. Well, would there be times when he would suggest that you get it? A. If he would be busy, I would assume that he would.

Q. Now, inviting your attention, Mr. Chacho, to on or about the morning of May 16, 1963, do you recall whether you went to work that particular day? A. Yes.

[11] Q. Can you tell us approximately what time you arrived at the parking lot on that day? A I generally arrived there about 8:00, sometimes a little after.

MR. SWINGLE: In the morning?

THE WITNESS: Yes.

BY MR. GOLDBERG:

Q. On that particular day, bearing in mind that this is the day, according to the records, when your car was not there when you came for it, can you recall whether it was parked for you on that morning or whether you turned it over to the operator of the parking lot on that morning? A. Definitely he parked it that day.

Q. Was the key left in the car as usual? A. Yes.

Q. Now, did the parking lot attendant in so far as you are aware or recall say anything to you on that particular morning in any fashion whatever? A. Just normal greeting and that was it.

Q. Did you stay long enough to see where he parked your car? A. No, I didn't.

Q. Would it be normal for you to bring the car on and get [12] out without seeing where he put it? A. Yes.

Q. Bearing in mind you arrived at about 8:00, can you tell us approximately what time you came back on that particular day? A. Roughly around 6:00 p.m.

Q. Had you at all returned to the lot during the day? A. No.

Q. By the way, do you have a specific spot where they normally park your car, or are they parked to unassigned spots? A. Unassigned spots.

Q. When you came back to the parking lot on the evening of the 16th, did you see the attendant there? A. Yes.

Q. Was that the same attendant who had been there in the morning? A. Yes.

Q Did you present yourself at the window or at this little house that you have told us about? A. Yes.

Q. Now, when you presented yourself, did you request your car? A. I didn't have to. He immediately proceeded to tell me [13] that he thought that I took my car.

Q. Do you know the name of this gentleman who is the attendant in these instances that you have told us about? A. No, I don't.

Q. Can you describe him to us? A. He is about six, two, about 170 pounds. He is a colored boy.

Q. Did he wear a uniform? A. At that time I don't think so but I'm not sure. Q. Now, you state that he was a bit surprised when you came to get your car that evening? A. Yes.

Q. What did he say to you? A. He says, "I thought you took your car."

Q. Did you give any response to that? A. I says, "If I did, I wouldn't be here to get it now."

Q. When you so advised him of this, did he say anything further to you? A. I asked him did he have any idea what happened, and he said no. So immediately I asked was it possible that it was stolen or did just somebody take it—maybe somebody was pulling a joke. And he said no. So I immediately proceeded to call the police and my insurance

company. After that [14] he proceeded to call the Colonial Parking lot office.

MR. SWINGLE: "He" meaning the attendant?

THE WITNESS: "He" meaning the attendant.

BY MR. GOLDBERG:

Q. Did he say to you when he had last seen your car on that particular day? A. He didn't specifically say, but he did indicate that he went to lunch for about ten minutes around 12:00 o'clock.

Q. To your knowledge when he went to lunch, was there any other attendant who remained in charge? A. Not to my knowledge.

Q. Did you ever see anyone else working with him on the lot, that is to say, more than one person? A. Not working, no.

* * *

[15] Q. Mr. Chacho, I wonder if you would kindly read that statement to yourself.

Mr. Chacho, do you recall giving this statement to Lieutenant Israel J. Tew of the Tenth Precinct, Police Department? A. Yes, I do.

Q. Is there anything in here which upon reflection is not a fact? A. I don't think so.

Q. You would say that this constitutes a true statement of the incident which we are speaking about? A. Yes.

* * *

[16] Q. Well, reading from Plaintiff's Exhibit No. 1 for identification, I quote:

> "He told me that he was gone about ten minutes and after returning he noticed that the car of mine was gone."

Now, if you made that statement, as you have indicated you have on this statement to the policeman, would it be your best judgment that that is the fact as to what the attendant told you? A. I would assume so since it was fresh in my memory at that time.

* * *

[18] Q. When you asked the attendant where he parked your car, did he point out where your car had been parked? A. Yes, he did.

Q. Can you tell us where that was with relation to the street? A. It was toward the alley. In fact, it was the second car from the alley.

Q. Can you tell us where this alley is located with respect to the street on which it is parked? A. It runs parallel to Corcoran Street.

Q. Well, would I understand that your car was parked—from the description given you by the attendant that it was actually on the alley? A. I don't know what you mean by "on the alley."

Q. By that I mean, was it parked, according to the description that he gave you, so that it could be driven off the lot right into the alley? A. Yes.

Q. Would I understand, therefore, that it would be [19] parked on the back of the lot rather than the front of the lot? A. That's right.

* * *

[20] Q. Do you know whether when you parked your car or when you brought your car in for parking whether the key was left [21] in the car or whether the attendant removed the key and took it into the little house? A. Well, I left my car as you come into the lot, taking the keys that I need with me and leaving the key in the ignition. Now, when he parked it I was already on my way to work, so I don't know what he did with the key.

Q. In those instances where you would go to the window of the shack and because he was busy, as you indicate, take the car yourself, would he have to give you the key or would the key normally be in the ignition? A. The key would normally be in the ignition.

Q. Do you recall any instance where you went to take the car yourself that the key was not in the ignition? A. No.

* * *

[26] Q. Do you of your knowledge have any understanding of what coverage Colonial Parking afforded this lot when the one attendant normally went to lunch? A. No.

Q. I beg your pardon? A. No.

Q. Do you know whether there was anyone in attendance when he did in fact go to lunch? A. I don't know.

Q. On the particular day that your car disappeared, did he indicate to you whether anyone was on the lot while he was [27] getting his lunch? A. I could only assume that it was unattended.

* * *

EXAMINATION BY COUNSEL FOR DEFENDANT CLAPPER

BY MR. SWINGLE:

* * *

Q. I believe you said that this lot in your opinion would hold around 75 to 100 automobiles? A. Yes.

Q. Were these automobiles, as you observed them, parked [28] in rows on the lot or were they just indiscriminately left there or what was the procedure so far as you observed? A. They do have marked off spots for a car to park in, not an assigned spot but a spot that is measured off for a car.

Q. I see. Where is this lot with relation to the nearest intersection or intersecting streets? A. It is bordered by New Hampshire and—it is New Hampshire and 16th right at the corner and on the other side it is 17th.

Q. What I am trying to get at is, is this lot in the middle of a block? A. Yes, it is in the middle of a block.

Q. Does Corcoran Street run relatively north and south or east and west? A. East and west.

Q. What is on the west side of the lot that is adjacent to this lot; is it an open field or a building or what? A. Houses.

Q. On the east side what is there? A. Houses.

Q. And the back of the lot is where the alley is that you spoke of earlier? [29] A. That's right.

Q. Is there anything in the way of a fence or other type of enclosure on the front of the lot that runs along Corcoran

Street? A. There is a brick along Corcoran Street with provision to pull in Corcoran Street.

Q. A brick wall, you mean? A. Yes, a brick wall.

Q. About how high is that? A. About three feet, I would assume.

Q. And there is one way of getting in, and that is a driveway off of Corcoran into the lot? A. There are two entrances. There are two ways of either getting on and/or getting off the lot on Corcoran Street plus the alley being open.

Q. Is one opening for going into the lot and the other for coming out? A. No.

Q. There are then two, what you might call exits and/or two entrances on Corcoran? A. On Corcoran.

Q. Where does the house or shack that you spoke of earlier—where is that situated with regard to these two [30] entrances or exits? A. It is at the first entrance on Corcoran Street.

Q. Is that the one nearest to the east side or to the west side of the lot? A. It is closer to the west side.

Q. As these cars are parked there—I am trying to get a mental picture of what it looks like—are the cars parked parallel with Corcoran from the front to the back and from Corcoran back to the alley?

A. No. They are parked parallel with Corcoran, this way (indicating).

Q. Parallel? A. And back this way (indicating).

Q. How many separate lanes are there from the east side to the west side of the lot? A. Three, I believe.

Q. Three? A. At that time there were three.

* * *

[31] Q. Do you have any idea as to how long your car was stopped there before the attendant physically came and moved it? A. Just a few minutes.

Q. Did you see him move it? A. I was there until he did move it.

[32] Q. You waited for him, you mean? A. Oh, yes.

Q. When you came to a stop on the lot, where did you stop with relation to this shack or house? A. Well, right

up over the sidewalk. You have to cross the sidewalk to get onto the lot.

Q. Where did you wait for the attendant to get your car? A. Right over the sidewalk.

Q. Did you wait in the car or out of the car? A. I was just getting out when he was coming down to the car.

* * *

[33] Q. Were you aware of the fact that, if it is a fact, that the attendant left the lot at lunch time? I don't mean on this particular occasion. Were you aware of the fact that the lot may or may not have been left unattended at that time for him to get lunch? A. I was not aware of it.

Q. Did you find out later that that was the practice, for him to take off to get lunch? A. I didn't find out until that particular day, and I still don't know if he continues or not.

Q. What was it you found out then on that particular day with regard to whether he did or did not normally go out [34] for lunch? A. That day I found out that the lot was unattended and that was all.

Q. This was around about noontime? A. Yes.

Q. He was gone about ten minutes? A. Yes.

Q. Do you know where he went to eat? A. No. The statements that you are asking me, I want to make one thing certain, he told me this, I'm not saying that I know that he left at 12:00.

Q. I understand. I understand you didn't return to the lot at any time from the time you left it in the morning, I presume it was around 8:00 o'clock in the morning, until you came that evening to pick it up, which I guess was about 6:00; is that right? A. That's right.

Q. Are there any restaurants that are near this place that you were aware of, or places of eating? A. The closest would be in the Dupont Circle area two or three blocks away.

* * *

[35] Q. You left your car the morning of May 16th or May 17th? A. May 16th.

Q. May 16th.

And you came back for it when? A. The evening, 6:00 o'clock p.m.

Q. Of May 16th? A. May 16th.

Q. When was it that you were advised that your car had been found? A. The 17th—no—the 18th.

[36] Q. The 18th? A. 12:10 a.m.

Q. That is shortly after midnight? A. Midnight of the 17th.

Q. You described to me the brick fence in the front of the lot. What was, if anything, on the back of the lot bordering the alley in the way of a fence or any other— A. There is no fence.

Q. Nothing there? A. In the back. Well, there are several trees.

Q. Is this a paved lot or was it dirt? A. Blacktop.

Q. Are there any posts or whatnot along the alley dividing the alley from the lot? A. No.

* * *

[37] EXAMINATION BY COUNSEL FOR DEFENDANT COLONIAL PARKING, INC.

BY MR. MAHONEY:

* * *

Q. Now, you do not know of your own knowledge at what time your car was removed from the lot, do you? A. Except he said that when he came back from lunch it was gone—the attendant.

Q. When you arrived at the lot that day to get your car, [38] did you make any effort to look for it yourself or is that when the attendant approached you and said, "I thought you had taken it"? A. Would you repeat that again.

Q. When you went to get your car that evening on May 16th, did you make any effort to look for your car before the attendant approached you? A. Well, I came on the lot and he had a surprised look on his face and he proceeded to say that "I thought you took your car." And I told him no. And he told me where it was parked and he thought that I took the car. That was all.

Q. Did he tell you when was the last time that he saw the car? A. Just in the reference to him going out to lunch, that he saw the car then, it was gone the next time that he came back.

Q. Did he say to you that he saw the car before he left for lunch? A. I think he did.

Q. Do you recall him saying that? A. I couldn't say positively.

Q. Did he tell you that he looked for your car when he returned from lunch? [39] A. No. He assumed that I took the car.

Q. Do you know why he made that assumption? A. Well, I did on occasion leave early when he was there. That was the only assumption he could make, I guess.

Q. Was it a full lot generally? A. Generally, yes.

Q. But there were vacant spaces every now and then? A. I'm not there most of the time, so I couldn't tell you what they are mostly.

Q. When you get there, what do you observe? A. When I am there in the morning I'm usually early before most of the regular parkers get there. When I leave in the evening I'm usually after the crowd already has left.

Q. So you are used to vacant spaces? A. There are not many cars there in the morning and there are not many at night.

* * *

FURTHER EXAMINATION BY COUNSEL
FOR DEFENDANT CLAPPER

BY MR. SWINGLE:

[40] Q. Had you previously gone to this lot and taken your car at a time when the attendant did not appear to be present? A. I haven't taken my car off the lot that often.

Q. Do you know if he was on the lot at that time? A. He generally is on the lot because—

Q. I'm talking about on this particular time that you took it and you didn't see him in the shack. Do you know if he was on the lot at that time? A. I don't recall.

Q. Do you know when that was with relation to the date that we have been talking about, May 16th and 17th? A. No, I don't.

Q. Was it before that date? A. It was before that date.

* * *

STATEMENT OF THOMAS CHACHO

Statement of Thomas (NMN) Chacho, white, male, 30 years, of 3714 - 37th Street, Mount Rainier, Md., telephone AP 7-2487, employed as a personnel officer at the World Health Organization (UN), 1501 New Hampshire Avenue, N.W., telephone HU 3-5280, made to Lieutenant Israel J. Tew, Tenth Precinct, at that precinct station, relative to the theft of his 1963 Rambler Station Wagon (blue) 4 door, Md. Tag #BD 11-58, from the parking lot at 1725 Corcoran Street, N.W. on May 16th, 1963. Statement commenced at 10:48 P.M., 5/18/63.

I am the sole owner of the 1963 Rambler Station Wagon (blue 4 door) which has Maryland Tags BD 11-58.

On the morning of the 16th of May, about 8:10 a.m., I arrived at the Colonial Parking Lot at 1725 Corcoran St., N.W. and as usual proceeded to turn my car over to the parking lot attendant, who parked the car in an unassigned spot. The attendant then eventually took possession of the car and I left. I have a monthly account with the Colonial Parking Company. The usual procedure is for the attendant to park the car. I was instructed by this same attendant when I first started parking there, that I was to leave the car keys in the car. Thusly assuming that the parking lot attendant had full responsibility for the car while same was left in his possession. I believe that I opened my parking lot account there in April of this year.

Upon returning to the lot at approximately 6 pm that evening, the parking lot attendant told me, "I thought you took your car", and I indicated to him that I had not taken it. He told me that he thought that I had taken it, because he told me that he had not seen the car since he went for lunch at approximately 12 noon. He told me that he was gone about 10 minutes and after returning he noticed that the car of mine was gone. This lot has only one attendant to the best of my knowledge. I immediately proceeded to call the police, my insurance company, and my wife. The attendant then called the Colonial Parking Company. The man from the Colonial Parking Company arrived first and asked me a number of questions about my car. He proceeded to circle the immediate area in search of my car. The police then arrived from #3 Precinct and asked me similar questions. Then the police left and I took a cab home.

At approximately 12:10 am the 18th of May, Officer Mower called to inform me that my car had been found, that a police officer was injured, and asked could I meet him at the US Attorney's office at approximately 9 am this morning.

I then recovered my car after reporting to the US Attorney's Office. I found that my car had damage on the front grill, a right tire (front) blown out, slight damage to the front bumper and the left front fender, and damage to the left side of the vehicle, entire length, and a broken side view mirror, and the rear view mirror was taken out. There was some glass on the floor of the car on the front. I found a door stopper in my car. I have not made a full inspection of my car at this time.

I am able to read and write and I have read the above statement in its entirety and it is my statement and the truth to the best of my knowledge and belief.

Signed Thomas Chacho
Thomas Chacho

/s/ Lt. Israel Tew
Witnesses by Lieut. Israel J. Tew #10
Statement conc
11:14 am 5/18/63

[Filed February 13, 1967]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 8th day of February 1967, before the Court and a jury of good and lawful persons of this district, to wit: (list of jurors omitted)

who, after having been duly sworn to well and truly try the issues between JOHN J. MORLEY, plaintiff, and COLONIAL PARKING, INC., MARY ANN CLAPPER, and THOMAS CHACHO, defendants, and after this cause is heard and given to the jury in charge, they upon their oath say this 13th day of February 1967, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the defendant, COLONIAL PARKING, INC., by reason of the premises is the sum of Twenty Thousand Dollars ($20,-000.00). The jury further finds for the defendant, MARY ANN CLAPPER, against said plaintiff; and further finds for the defendant, THOMAS CHACHO, against said plaintiff, by direction of the Court.

WHEREFORE, it is adjudged that said plaintiff recover of the said defendant, COLONIAL PARKING, INC. the sum of Twenty Thousand Dollars ($20,000.00), together with costs.

WHEREFORE, it is further adjudged that said plaintiff take nothing by this action as to said defendants, MARY ANN CLAPPER and THOMAS CHACHO, and that said defendants, MARY ANN CLAPPER and THOMAS CHACHO go hence without day, be for nothing held and recover of plaintiff their costs of defense.

ROBERT M. STEARNS, Clerk

By Sophie Lyman, Deputy Clerk

Judge Richmond B. Keech, Presiding

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN MORLEY,
Plaintiff,

v.

COLONIAL PARKING, INC.
Defendant.

Civil Action No. 1946-63

Considered & denied. /s/ R. B. Keech 3/13/67

MOTION OF DEFENDANT COLONIAL PARKING, INC. TO SET ASIDE VERDICT AND JUDGMENT FOR THE PLAINTIFF AND FOR DIRECTED VERDICT

Defendant moves the Court, pursuant to the provisions of Rule 50 F.R.C.P. to set aside verdict and judgment for plaintiff against defendant Colonial Parking, Inc. entered on February 13, 1967 and for entry of judgment for defendant Colonial Parking, Inc., notwithstanding the verdict upon its motion for a directed verdict as more fully set forth in the attached memorandum: and for reason therefor says that plaintiff, as a matter of law, failed to prove facts upon which a jury could infer that any negligence of defendant Colonial Parking, Inc. was a proximate cause of the accident and injuries to plaintiff.

PLEDGER & MAHONEY

By John F. Mahoney, Jr.
925 Washington Building
Washington, D. C. 20005
Attorneys for Defendant

A copy of the foregoing motion to set aside verdict and judgment for the plaintiff and for directed verdict and memorandum of points and authorities was mailed, postage

prepaid, this 17th day of February, 1967 to Harry W. Goldberg, Esquire, attorney for plaintiff, 1511 K Street, N.W., Washington, D. C.

John F. Mahoney, Jr.

NOTICE OF APPEAL

[Filed 4/10/67]

Notice is hereby given this 10th day of April, 1967, that defendant, Colonial Parking, Inc. hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 13th day of March, 1967 in favor of plaintiff against said defendant.

JOHN F. MAHONEY, JR.
925 Washington Building
Washington, D. C. 20005
Attorney for Defendant

Copy to:

Harry W. Goldberg, Esquire
1511 K Street, N.W.
Washington, D. C. 20005
Attorney for Plaintiff.

RELEVANT DOCKET ENTRIES

1963

July 31. Complaint, Jury demand

July 31. Summons

August 27. Answer of deft 3 to complaint

September 4. Answer of deft 2 to complaint

September 4. Cross claims of deft 2 vs defts 1 & 3

September 4. Interrogatories of deft 2 to pltf

September 10. Answer of deft 1 to complaint and cross claim vs deft 2

September 12. Answer of deft 3 to cross claim of deft 2

September 18. Answer of deft 1 to cross claim of deft 2

October 2. Answer of pltf to interrogatories

November 27. Answer of deft 2 to cross claim of deft 1

1964

October 13. Cause and cross claims dismissed as of 10/9/64

October 19. Motion of pltf to reinstate

November 2. Order reinstating cause

1965

January 8. Motion of defts 1 & 2 to reinstate cross claim

January 15. Order reinstating cross claims by Colonial Parking & Mary Ann Clapper Matthews J.

1966

April 19. Pretrial Proceedings

October 7. Letter of atty for pltf 10/6/66 for additional damages

1967

February 8. Trial begun, oral motion of deft 3 for a directed verdict argued and granted Keech J.

February 13. (Verdict) Verdict and judgment for the plaintiff against Colonial Parking Inc. in the sum of $20,-000.00 and for the deft Mary Ann Clapper against the plaintiff; and for Thomas Chacho against the pltf, by direction of the court Keech J.

February 20. Motion of deft 1 to set aside verdict and judgment for pltf and for a directed verdict; P&A

February 27. Opposition of pltf to motion of deft 1 to set aside verdict and judgment and for a directed verdict; P&A

March 13. Reply memorandum of deft Colonial Parking Inc.

March 13. Motion of deft Colonial Parking Inc. to set aside verdict and judgment for pltf and for a directed verdict — considered and denied Keech J.

April 10. Notice of appeal by deft from judgment of 3/13/67

BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,002

COLONIAL PARKING, INC.

Appellant,

v.

JOHN MORLEY

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HARRY W. GOLDBERG
MORRIS ALTMAN
MAX M. GOLDBERG

831 Investment Building,
1511 K Street, N.W.,
Washington, D.C. 20005

Attorneys for Appellee

Washington, D. C. · THIEL PRESS · 202 · 393-0625

COUNTER STATEMENT OF QUESTION PRESENTED

In the opinion of the appellee, the question is this:

Where a motor vehicle regularly parked on a large, commercial outdoor lot under monthly contract requiring the owner to leave key in switch, is stolen from the lot at approximately noon while the lot is negligently unattended, and when despite the known disappearance of the vehicle, no investigation or effort to locate the vehicle is undertaken until evening, and when on the following day, twelve blocks away, the thief, while operating the vheicle, negligently collides with plaintiff-pedestrian, was the trial court correct in submitting to the jury the issue of the negligence of the parking lot operator as a proximate cause of plaintiff's injuries?

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TABLE OF CASES

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,002

COLONIAL PARKING, INC.

Appellant,

v.

JOHN MORLEY

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

APPELLEE'S COUNTER STATEMENT OF CASE

This is an action for damages brought by the plaintiff against Colonial Parking, Inc., an organization engaged in the operation of parking lots in the District of Columbia. Also named as parties defendant were Thomas Chacho, owner of an automobile which was regularly parked on Coonial's outdoor lot at 1721 Corcoran St., N.W., Washington, D. C. under a monthly parking contract. Joined as an additional co-defendant is Mary Ann Clapper Ott, owner of a second vehicle.

The plaintiff, a policeman-pedestrian, was struck by the Chacho vehicle on May 17, 1963, at approximately 8:30 P.M. The auto was being operated by one Willie Sheler who had stolen it on the previous day from Colonial's parking lot. (J.A. 19) The force of the impact threw plaintiff into the path of the Ott vehicle, which in turn struck him. (JA 17)

The Court granted a directed verdict in favor of the owner of the stolen vehicle, Chacho. The jury returned a verdict in favor of the defendant, Ott, and a verdict for the plaintiff against the defendant, Colonial Parking, Inc., for damages in the sum of Twenty Thousand Dollars ($20,000.00). (JA 36)

This appeal involves the plaintiff, Morley, and the defendant, Colonial Parking, Inc. and no others. For purposes of simplicity, hereafter the appellee, Morley, will be referred to either as plaintiff or Morley, the appellant, Colonial Parking, Inc., will be referred to as Colonial, and the owner of the stolen vehicle will be referred to as Chacho.

As of May 16, 1963, Chacho, a personnel officer with the World Health Organization, was a regular monthly contract parker on an outdoor lot operated by Colonial at 1721 Corcoran St., N.W., Washington, D. C. (JA 21, 22). This parking lot accommodated from seventy five to one hundred vehicles and was generally full. (JA 22, 23) Chacho would bring his car to the lot in the morning about 8:00 A.M. and pick it up usually around 6:00 P.M. in the evening. (JA 25, 26) Colonial employed one attendant to operate this lot, and he received and parked the cars in the morning and delivered the cars at night. (JA 25, 26, 27) Chacho never saw more than one person working at this lot during the period that he parked there. (JA 27) When the lot attendant went to lunch, there was no other attendant in charge. (JA 27) When Chacho brought his car to the lot, in the morning, the keys were always left in the ignition in accordance with instructions given by the attendant when Chacho first started parking there. (JA 28, 34)

This parking lot was located in the middle of the 1700 block of Corcoran Street, N.W., a street running relatively east and west. Houses are located on both the east and west sides of the lot. (JA 29) There were two means of getting onto and off the lot from Corcoran Street, through east and west entrances and exits. (JA 30) The lot ran back directly to a public alley but there was no fence nor posts separating the lot from the alley. (JA 28, 29, 32) On May 16, 1963 the Chacho vehicle was brought in about 8:00 A.M. and was parked by the attendant at the back of the lot on the alley, so that it could be driven off right into the alley. (JA 28) When Chacho came to get his vehicle at approximately 6:00 P.M. on the evening of May 16, 1963, the attendant appeared surprised and stated that he thought Chacho had taken the vehicle earlier. (JA 32, 35) The attendant told Chacho that he had gone to lunch for about 10 minutes around 12:00 o'clock and that when he returned, the Chacho vehicle was gone. (JA 27, 35) There were no restaurants in the area, the nearest eating place being approximately 2 or 3 blocks away. (JA 31) The attendant told Chacho that he had seen the car before he left for lunch and when he returned he noticed the car was gone. (JA 32, 35) The attendant made no effort to look for the car when he returned from lunch and found it gone, assumed that Chacho had taken it. (JA 33, 35) When Chacho returned at approximately 6:00 P.M. and found the car missing, Chacho called the police who then arrived on the scene. (JA 35) The attendant called Colonial who then sent a man to the scene. (JA 35)

Morley was a policeman employed by the Metropolitan Police Department of the District of Columbia. (JA 10) He began directing traffic at approximately 8:00 P.M. on the evening of May 16, 1963 in the 2800 block of 16th Street, N.W., standing on the center dividing line near the north entrance of the Mexican Embassy, directing south bound traffic on 16th Street. (JA 10, 11) While so doing, Morley was struck by the Chacho vehicle which was proceeding southbound on 16th Street. A witness, police offi-

cer Sprowls, who was stationed some 50 feet south of Morley directing northbound traffic at a point approximately opposite the south entrance to the Mexican Embassy, observed the southbound vehicle as it struck Morley. (JA 15, 16) As Sprowls turned to look northward, he saw the Chacho vehicle traveling south on 16th Street, straddling the center dividing line on which Morley was standing. (JA 16) The Chacho vehicle then struck Morley and knocked him into the northbound lane of traffic, where he was run over by a northbound vehicle operated by the defendant, Ott. (JA 16, 17)

Counsel for Colonial and for Morley agreed to the following stipulation of fact which was made part of the record and read to the Jury:

> "The motor vehicle owned by Thomas Chacho was stolen on May 16, 1963 by one Willie Sheler of 1414 Girard Street, N.W., Washington, D. C., from a parking lot operated by Colonial Parking, Inc., 1721 Corcoran Street, N.W., Washington, D. C. At about 8:30 P.M. on May 17, 1963, while operating the stolen vehicle southbound in the 2700 block of 16th Street, N.W., Washington, D. C., Willie Sheler struck and injured the plaintiff, John J. Morley. The distance between the aforesaid parking lot and the place of the accident is about 12 city blocks." (JA 19)

The deposition of the defendant, Chacho, who was absent from the United States at the time this case was tried, was read into the record by the plaintiff as a part of his case.

Colonial offered no testimony of any kind in defense of this action except a medical expert.

At the conclusion of plaintiff's case, a motion by Chacho for a directed verdict was granted. The case was submitted to the Jury against the defendants, Colonial and Ott. The Jury returned a verdict in favor of the defendant, Ott, and a verdict for the plaintiff against Colonial in the sum of Twenty Thousand Dollars ($20,000.00). (JA 36) Colonial thereafter filed a motion for judgment N.O.V.

which was denied, whereupon it noted its appeal. (JA 37, 38)

SUMMARY OF ARGUMENT

The basic question for consideration on this appeal is whether the trial Court correctly submitted this case to the Jury on the issue of proximate cause.

The position of the Appellant is that while admitting *Ross v. Hartman* and *Schaff v. Claxton* remain the law in this jurisdiction, the Appellant contends that *Howard v. Swagart* and *Casey v. Corson and Gruman Company*, are controlling in the case at bar. Further, Appellant contends that *Ross* is a minority view basically unacceptable, since it has not been adopted in most jurisdictions.

The Appellant's arguments that *Howard* and *Casey supra* are controlling is untenable. In *Howard*, this Court ruled that the negligent operation of a motor vehicle by a person *other than the thief* constituted an intervening cause which broke the chain of causation, and rejected the extension of *Ross* to cover negligence of persons other than the thief. The *Howard* decision is irrelevant to the case at bar since the injury sustained by Morley was caused by the operation of the motor vehicle by the thief who stole it from Colonial's parking lot, a matter specifically stipulated to by all parties at the time of trial.

Furthermore, *Casey* deals with and rules uniquely on a specific set of facts and circumstances not comparable to the instant case. The brief but clear wording of the decision limits the findings of this Court to the particular elements of time, place and circumstance there present. The case of *Boland v. Love*, which follows and interprets *Casey*, this Court emphasizes that *Casey* does not change the law of this jurisdiction and that the issue of proximate cause must be considered in the light and dependent upon the facts and circumstances of each case, and unless the facts and the reasonable inferences deducible therefrom are so

free from doubt as to require the Court as a matter of law to rule that there is no causal connection between the negligence and the injury, then the issue is one that must be submitted to the Jury for determination.

On the uncontradicted evidence in this case, it is clear that on May 16, 1963, the negligence of Colonial in knowingly permitting its large outdoor parking lot, containing 75 to 100 vehicles with key in switch, to remain unattended, combined to constitute a proximate cause of Morley's injury. Although the Chacho vehicle was discovered to be missing at noon, no effort was made by Colonial to determine whether the taking was lawful or larcenous, nor to determine the whereabouts of the vehicle until later that evening, thereby compounding the negligence and strengthening the probability of ultimate injury that prudently should have been foreseen in permitting the lot to be unattended in light of all the circumstances, an issue was created for consideration by the Jury on whether the injuries sustained by Morley at the hands of the thief operating the stolen vehicle were clearly foreseeable in view of the multiple negligence of the defendant, and whether such negligence was a proximate cause of Morley's injury. At the very least, the uncontradicted evidence constituted an issue on which reasonable men might readily differ and the trial Court correctly followed the law in this jurisdiction in submitting the issue of proximate cause to the Jury.

ARGUMENT

1 (a) The Negligence of Colonial Was Clearly a Proximate Cause of the Injuries Sustained by Morley.

1 (b) On the Basis of the Uncontradicted Evidence of Negligence on the Part of Colonial, the Inferences Deducible From That Evidence, and in Consideration of the Special Circumstances Reflected in This Case and the Prevailing Law in This Jurisdiction, the Question of Whether the Negligence of Colonial Was a Proximate Cause of Plaintiff's Injury Was a Proper Question for the Jury.

This case involves a motor vehicle stolen at high noon from a large unattended parking lot which required all vehicles to be left with key in switch. The Appellee did not contend below nor does he here contend that there was negligence on the part of Colonial in leaving the cars unlocked, this Court having ruled in *Howard v. Swagart*, 82 U.S. App. D.C. 147, 161 F.2nd 651, that such an act does not constitute negligence. Rather, the initial negligence charged to Colonial is in permitting the lot to remain unattended and in the implicit awareness that in permitting the lot to remain unattended, large numbers of automobiles with key in switch were readily available to the larcenous intent and illicit purpose of any passing thief.

The practice of permitting cars parked on commercial lots to have the keys remain in the switch places a weighty responsibility upon the operator of the lot. That responsibility requires the operator to provide adequate personnel to attend and supervise the vehicles at all times during the hours of operation in order to assure that cars parked on these lots will not be removed by persons intent on theft. The parking of motor vehicles on commercial lots with key in switch is designed for the benefit and convenience of the lot operator and of his employees; such practice promotes speed and efficiency in the handling of vehicles and results

in economy to the operator of the lot. This practice of parking cars with key in switch is equally well known to car thieves.

Thus, while the procedure benefits the parking lot operator, it also affords auto thieves a fertile field for carrying out their criminal intent unless the operator properly anticipates this possibility and protects against it by providing reasonable attendance and supervision. All the more is theft likely where the lot is a ground level, outdoor lot as here involved, located in the heart of the city with multi-means of access to and from the lot and particularly, as in this case, where automobiles may be driven off the lot directly into a street or public alley. All of these factors combine to place upon the operator of the lot the responsibility of providing his lot with adequate personnel to supervise and to protect the cars stored with him during his hours of operation. The operator of the lot in the conduct of his business is properly held to the duty of providing adequate and reasonable supervision for the lot and is responsible for all injuries proximately caused by such negligence.

In the case of *Ross v. Hartman*, 78 U.S. App. D.C. 217, 139 Fed. 2d 14, cert denied 321 U.S. 790, this Court held that leaving a truck unlocked in a public alley with key in switch in violation of D.C. Motor Vehicle Regulations constituted negligence and the proximate cause of plaintiff's injuries. In reversing the earlier case of *Squires v. Brooks*, 44 U.S. App. D.C. 320, this Court commented as follows:

> "We cannot reconcile that decision with facts which have become clearer and principles which have become better established than they were in 1916 and we think it should be overruled."
>
> ". . . Everyone knows now that children and thieves frequently cause harm by tampering with unlocked cars. The danger that they will do so on a particular occasion may be slight or great. In the absence of an ordinance, therefore, leaving a car unlocked might not be negligence in some circumstances, although in

> other circumstances it might be both negligent and a legal or 'proximate' cause of a resulting accident."

This Court went on to say:

> "It puts the burden of the risk, as far as may be, upon those who create it. Appellee's agent created a risk which was both obvious and prohibited. Since appellee was responsible for the risk it is fairer to hold him responsible for the harm than to deny a remedy to the innocent victim."

In the subsequent case of *Schaff, et al v. R. W. Claxton, Inc.*, 79 U.S. App. D.C. 207, 144 Fed. 2d 532, the facts there involved injury by a truck parked on private space, with key in switch, wrongfully removed and driven off with resulting injury to a third person. Following the reasoning in the *Ross case, supra,* the Court said:

> "Under that ruling the evidence in the present case should have been submitted to the jury with instructions to find for the plaintiffs if they found that the defendant's driver was negligent in leaving the car unlocked and that this negligence was a proximate cause of the accident."

The Appellant seeks to identify the case at bar with the decisions of *Howard v. Swagart*, 1947, 82 U.S. App. D.C. 147, 161 Fed. 2d 651 and *Casey v. Corson and Gruman Company*, 1955, 95 U.S. App. D.C. 178, 221 Fed. 2d 51.

Appellant reviews the *Howard* case in great detail in his brief, with particular reference to the Court's refusal there to find proximate cause in the theft of an automobile from the private parking garage which vehicle ultimately was involved in an accident in which the plaintiff sustained injuries.

The *Howard* case has no application to the case at bar since *Howard* involves an automobile stolen from a commercial parking lot by an employee of the lot and later loaned by the thief to a friend, who while driving same, struck and injured the plaintiff. On the basis of these facts, this Court declined to apply the law as reflected in *Ross* and *Schaff* stating as follows:

> "It cannot fairly be said that this Court meant, by the *Ross* and *Schaff* decisions, to impose liability on the owner, or here the bailee, of an unlocked car for the negligent action that every person, *other than the thief*, driving it subsequent to the theft." (Emphasis supplied)

The *Howard* case *supra* is therefore readily distinguishable from the case at bar since in deciding *Howard*, this Court found an efficient intervening cause in the loan of the stolen vehicle by the original thief to a friend who was driving it when plaintiff was injured. In the case of *Boland v. Love*, 95 U.S. App. D.C. 337, 222 Fed. 2d 27, this Court emphasized that the operation of the vehicle by a party other than the thief was the factor in breaking the chain of proximate cause in *Howard*.

In the case at bar, no such exception exists. On the contrary, counsel for Colonial and Morley clearly stipulated in open Court in a statement read to the Jury that the original thief was in fact operating the stolen vehicle at the time that it struck the plaintiff. (JA 19)

Further, it would appear from the record and from Appellant's brief that negligence of Colonial is conceded since no testimony of any kind was offered by Colonial to offset the testimony offered by Morley at the trial of this cause, establishing that Colonial's large and crowded parking lot holding 75 to 100 cars each with key in switch was completely unattended at the time that the Chacho vehicle was stolen from the lot. Uncontradicted evidence further established that no effort was made by Colonial to locate the vehicle, to determine its whereabouts or to ascertain whether the taking was lawful or larcenous until sometime after 6:00 P.M. that evening when the appearance of Chacho, owner of the vehicle, aroused Colonial to action.

Colonial concedes that the sole question for consideration on this appeal is that of proximate cause and argues that the case at bar is controlled by the decision of this Court in *Casey v. Corson and Gruman*, 1955, 95 U.S. App.

D.C. 78, 221 F.2d 51. It is respectfully submitted that the position of the Appellant in this respect is not tenable.

In *Casey*, a truck owned by a construction company and used in connection with the operation of its business was parked on the company lot with the key in the ignition and stolen in the District of Columbia. On the following day, on a highway 15 miles south of Petersburg, Virginia, a distance which is fairly stated at approximately 135 miles from Washington, the truck collided with an automobile causing personal injury and property damage to a third party. In affirming a directed verdict by the trial Court on these facts, the Court stated:

> "The negligence thus sought to be charged the defendant under the principles of *Ross v. Hartman*, 78 U.S. App. 217, etc., was too remote from the collision in time, place and circumstances to be a proximate cause of plaintiff's injuries."

It is obvious from a reading of *Casey* that it was not intended to nor does it purport to change the law established by this Court in *Ross v. Hartman, supra*, but is personal and unique to the particular case with which it dealt. That this is a restricted ruling was made clear in *Boland v. Love, supra*, which followed *Casey* and in which this Court reviewed, distinguished and clearly indicated that the *Casey* decision contemplated only a consideration of the specific facts in that case. In referring to *Casey*, this Court said:

> "Recently we denied recovery for failure to establish a proximately causal relationship between plaintiff's injury and defendant's alleged negligence, in *Casey v. Corson & Gruman Company*, 1955, 95 U.S. Appeals, D.C. 178, 221 Fed. 2d. 51. There an unlocked sand and gravel truck was stolen during the night from the construction company's private parking lot. The unknown thief struck the plaintiff's truck near Petersberg, Virginia, but there was no element of entrustment and no knowledge on the part of the owner that the vehicle was to be operated in any manner by the thief and no reason

to foresee it might be driven to Virginia. We pointed out that leaving the truck unlocked on defendant's lot 'was too remote from the collision in time, place *and circumstances.*'" (Emphasis Supplied)

The Court went on to say in re-affirming the established law on proximate cause:

"It is clear under our common law in applying the standard of ordinary care, that particular conduct, *depending upon circumstances*, can raise an issue for the jury to decide in terms of negligence and proximate cause . . ." (Emphasis Supplied)

The Court continues and quotes with approval from the case of *Scott v. Sims*, 1949, 188 Va. 808, 51 S.E. 2d 250:

"In order for the defendant's negligence to be a proximate cause of the injury, it is not necessary that the defendant should have foreseen the precise injury that happened. It is sufficient if an ordinary, careful and prudent person ought, under the circumstances, to have foreseen that an injury might probably result from the negligent act."

This Court then goes on to say:

"Such principles are well-established by many Virginia precedents, and unless the fair inferences are so free from doubt as to permit the Court as a matter of law to conclude that there was no causal connection between the negligence and the injury the issue is one for the jury . . ."

Considering the facts and the fair inferences in the case at bar, certainly the trial Court acted appropriately and within the framework of these principles in submitting the issue of proximate cause to the Jury.

A similar expression is set out in the case of *Elgin A.S. Traction Company v. Wilson*, 217 Illinois 47, 75 N.E. 436, where a switchman left the switch unlocked and it was opened by a trespasser, bringing about a collision. The Court ruled:

> "That a collision was caused by the tortious act of a stranger could have no effect to relieve the common carrier from responsibility to an injured passenger, if the failure of the common carrier to do that which human foresight and forethought would have suggested presented an opportunity for the commission of a tortious act."

An important decision by the highest Court of the State of Illinois follows the principles of law which have been laid down in this jurisdiction in *Ross v. Hartman, supra,* and are highly relevant in the case at bar. In the case of *Ney v. Yellow Cab Co.*, 2 Ill. 2d 74, 117 N.E. 74, 51 ALR 2d 624, the Court stated as follows:

> "In *Neering v. Illinois Central Railroad Company*, 338 Ill. 366, 50 N.E. 2d 497, 503, we stated: 'what constitutes proximate cause has been defined in numerous decisions and there is practically no division of opinion as to what the rule is. The injury must be the natural, probable result of the negligent act or omission, or be of such a character as an ordinarily prudent person ought to have foreseen as likely to occur as a result of the negligence, although it is not essential that the person charged with negligence should have foreseen the precise injury which resulted from the act."

In a further discussion of foreseeability as it applies today with respect to stolen vehicles and the probability of injury resulting therefrom, the Court stressed certain practical and realistic considerations which all prudent persons, including appellants are properly charged with:

> "The increase of casualties from traffic accidents is a matter of common knowledge and concern. The incidence of automobile thefts and damages and injuries resulting from such larcenous escapades has accordingly increased. Juvenile delinquency has reached proportions alarming to everyone. Three major wars during the lifetime of this generation have had their effect upon the mental attitudes, not only upon those who endured the physical suffer-

ing and mental anguish, but upon all our society. Comparative regard and disregard for the rights and property of others have not been unaffected. Automobiles, once considered a luxury, are now considered by many to be a necessity. The man who once walked a mile now drives a block. The speed and power of automobiles have increased to the extent that safety experts are now showing keen awareness of their potentials even in the hands of rightful owners and careful operators. Incidents of serious havoc caused by runaway thieves or irresponsible juveniles in stolen or 'borrowed' motor vehicles frequently shock the readers of the daily press. *With this background must come a recognition of the probable danger of resulting injury consequent to permitting a motor vehicle to become easily available to an unauthorized person.*" (Emphasis Supplied)

In affirming the submission of the *Ney* case to the Jury, the Court went on to say:

> "We think that they (reasonable men) might differ on the question whether there were *special circumstances* surrounding the defendant's violation of the statute which made it the proximate cause of the damage that followed. We think that the question of the defendant's liability was for the Jury." (Emphasis quoted).

It will be noted that the foregoing decision follows the thought and wording herein before cited from *Boland v. Love, supra*, that the case and its submission to the Jury must turn on the "special circumstances" in each case.

Further, the words of Judge Cardoza in the landmark case of *Palsgraf v. Long Island Railroad Company*, 248 N.Y. 339, 162 N.E. 99, succinctly states the position of Appellee:

> "The range of reasonable apprehension is at times a question for the Court and at times, if varying inferences are possible, a question for the Jury."

Certainly, forethought and foresight by Appellant would have readily suggested that permitting its lot to be com-

pletely unattended while its lone employee went to lunch daily inevitably would invite the tortious act which here occurred. The average citizen is fully acquainted with the probabilities of theft presented by the unattended vehicle with key in switch. These are matters warned against in the press, by radio and television. In the Federal Bueau of Investigation Bulletin, Vol. 23, No. 6, June, 1954, it was reported that:

> "In 1953, 226,531 automobiles were stolen and notes an official statement made by one of the nations largest police departments that 90% of all cars stolen were left with the key in ignition or the switch unlocked."

Further in a quote from a keynote address by the Executive Director of the International Association of Chiefs of Police at the 15th Annual Seminar of the International Association of Auto Theft Investigators published in the Washington Post dated August 1, 1967, it is stated:

> "A Department of Justice survey of 4,000 auto thefts found that 76% of the stolen cars had been left unlocked and that 59% had the keys in the ignition or the ignition in an unlocked position."

Certainly, on the basis of the prevailing law, for this jurisdiction, the trial Court was completely correct in submitting the case at bar to the Jury. There was in the first instance clear and uncontradicted evidence of negligence on the part of Colonial. Further, as a highly experienced and sophisticated operator of parking lots, Colonial should have been fully aware of the foreseeable and probable outcome of permitting its large unfenced outdoor parking lot to remain unattended while large numbers of shiny new motor vehicles with keys in switch, parked close to street and alley exits offered easy targets to the criminal element and persons easily tempted. This negligence was compounded by Appellant's failure to take any action for many hours to attempt to locate or determine the whereabouts of the missing vehicle after learning that the Chacho vehicle had been removed from the lot while the lot was not attended. There

was every reason for Colonial to assume that the car had been stolen rather than to assume that it had been taken by its true owner. Certainly at the very least, normal doubt justified an investigation or a phone call to the owner. This lack of concern for many hours following the taking of the Chacho vehicle made it possible for the thief to make good his escape and to insure his retention of the car by delaying investigation until nightfall. This delay unquestionably made possible the retention of the stolen car through the following day and more probable the injury to Morley.

Appellee submits that it was completely foreseeable that the thief would retain the car to the following day and that Morley's injury at a point not far removed from the point of theft fully met the test of proximate cause.

At the very least in consideration of the uncontradicted elements of evidence submitted at the trial and the fair inferences deducible therefrom, there can be no question but that these issues of negligence and proximate cause are issues on which reasonable men might readily differ. Certainly, it may be fairly contended that the reasonable inferences are not so free from doubt as to justify the Court as a matter of law in concluding that there was no causal connection between the negligence of the Appellant and the injury. On the contrary, there were compelling evidentiary reasons to submit this case to the Jury. On the facts and circumstances present in the case at bar, the ruling in *Casey, supra*, is completely inapplicable. The trial Court was fully correct in submitting this case to the Jury.

CONCLUSION

The facts and circumstances of the case at bar must be tested by the long established doctrines of law in this jurisdiction dealing with the issues of negligence and proximate cause. In light of the particular facts and circumstances, the trial Court did not err in submitting this case to the Jury. The issue here is substantial and involves a practical situation growing out of the large and active commercial park-

ing lot industry. Each case is entitled to be considered on the basis of the particular facts and circumstances applicable thereto. The case at bar clearly establishes definite negligence of a continuing nature where one has the right to expect skillful care and alert concern. On the basis of the uncontradicted evidence, on the basis of the law applicable in this jurisdiction, it is respectfully contended that the trial Court acted correctly in submitting this case to the Jury and in denying the Appellant's motion for judgment notwithstanding the verdict.

Accordingly, judgment below should be affirmed.

Respectfully submitted,

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In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 21,002

COLONIAL PARKING, INC.
Appellant,

v.

JOHN J. MORLEY
Appellee.

PETITION FOR REHEARING BY THE DIVISION OR FOR HEARING EN BANC

Colonial Parking, Inc. petitions the Court pursuant to Rule 26, for a rehearing by the Division which heard and decided this case, on the alternative, for a hearing en banc, pursuant to 28 U.S.C.A. 46, upon the following grounds:

1. The decision herein by implication overrules *Casey v. Corson and Gruman Co.*, 95 U.S.App.D.C. 178, 221 F.2d 51, a prior per curiam decision of this Court and its widespread application to future tort cases warrant reconsideration by the full bench.

2. For all practical purposes, the decision of this Court eliminates the burden of proving proximate cause in tort actions.

3. The decision in *Casey* is sound law; it represents the overwhelming majority view and it should accordingly be followed.

I.

The Decision Herein by Implication Overrules Casey v. Corson and Gruman, Supra, a Prior Per Curiam Decision of This Court and Its Widespread Application to Future Tort Cases Warrant Reconsideration by the Full Bench.

In 1955 this Court in a per curiam opinion in *Casey v. Corson and Gruman Co., supra*, reaffirmed the principle that in tort actions, the burden of proving proximate cause is imposed on plaintiffs for legal responsibility to attach to the defendant. The relevant facts in *Casey* are these: A vehicle was stolen from defendant's private parking lot in the District of Columbia and many hours later (considerably less than 32 as in this case), this vehicle, 15 miles south of Petersburg, Virginia, negligently operated by the thief, struck and injured plaintiffs.[1]

On the above facts, this Court held as a matter of law that the negligence sought to be charged was too remote from the collision, in time, place and circumstances to be a proximate cause of plaintiff's injuries.

In the case at bar, the relevant facts are: A vehicle was stolen from the defendant's parking lot some 32 hours prior to the accident in question, which occurred 12 blocks away from the place where the vehicle was stolen. In its opinion, this Court states that this case

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[1] In its opinion, this Court states in footnote No. 1 that the truck struck the plaintiff as it was being negligently operated by an unknown person who fled the scene, from which one might infer that this person might have been someone other than the original thief. However, the lower court found in its ruling that the truck was stolen in the District of Columbia and driven to Virginia by the thief and the thief negligently collided with the plaintiff's vehicle (Ruling of the Court, Appendix, page 24(a)).

"falls between" *Ross v. Hartman,* 78 U.S.App.D.C. 217, 139 F.2d 14, and *Casey,* but where the Court feels the distinction lies is most unclear. Distance from the place of the theft could hardly be a vital factor, as the thief here could have traveled to Petersburg and back twice within the stipulated time period. The place of the accident could only be a fortituous circumstance. More than likely, the thief took the stolen vehicle and parked it somewhere in the vicinity of his residence, 1414 Girard Street, N. W., Washington, D. C. (J.A. 19); went about his business the following day; and that evening on 16th Street, struck the plaintiff.

In *Boland v. Love,* 1955, 95 U.S.App.D.C. 337, 222 F.2d 27, which this Court cites in support of its ruling in this case, it is interesting to note how the Court distinguishes its factual considerations from *Casey* (page 34, 222 F.2d):

> "Recently we denied recovery for failure to establish a proximately causal relationship between plaintiff's injury and defendant's alleged negligence in Casey v. Corson & Gruman Co., 1955, __ U.S.App. D.C. __, 221 F.2d 51. There an unlocked sand and gravel truck was stolen during the night from a construction company's private parking lot. The unknown thief struck the plaintiff's truck near Petersburg, Virginia, but there was no element of entrustment and no knowledge on the part of the owner that the vehicle was to be operated in any manner by the thief and no reason to foresee it might be driven to Virginia. We pointed out that leaving the truck unlocked on defendant's lot 'was too remote from the collision in time, place *and circumstances.*' (Emphasis supplied.)"

Looking now at this case, as in *Casey,* there is

1. No element of entrustment;

2. No knowledge on the part of the owner that the stolen vehicle was to be operated in any manner by the thief; and

3. No reason to foresee that it might be operated a day and a half later on 16th Street.

Accordingly, the same reasoning for distinguishing *Boland* from *Casey* is found here.

As previously argued in appellant's brief, the decision of *Ross v. Hartman*, 1943, 78 U.S.App.D.C. 217, 139 F.2d 114, cert.den. 321 U.S. 790 is inapposite, for its basis was an interpretation of our local traffic act from which the issues of negligence and proximate cause arise. Likewise, in the case of *Ney v. Yellow Cab Company*, 2 Ill. 2d 74, 117 N.E. 2d 74, cited and discussed by this Court in support of its opinion herein involved a construction of an Illinois traffic act. Neither involved strictly common law principles as in this case. Moreover, the identical argument advanced here by appellee was advanced by the appellant in *Casey*. The *Ney* case was cited several times in appellant's brief and heavily relied upon. In addition, an FBI bulletin, dated June 1, 1954 regarding the then-recent increase in auto thefts was attached to appellant's brief and marked as "Exhibit A". In sum, there is nothing advanced here that had not been fully considered by this Court in *Casey* where the Court ruled that the burden of proving proximate cause was not met as a matter of law. Clearly then, if *Casey* was correctly decided, and, it is respectfully submitted that it was, then this case could not have been.

II.

For All Practical Purposes, the Decision of This Court Eliminates the Burden of Proving Proximate Cause in Tort Actions.

In a very recent opinion in this Court in *Dunn v. Marsh* (Appeal No. 21,169, decided February 2, 1968), this Court repeated the principle that the burden of proving proximate cause is imposed upon plaintiffs and restates its definition as follows: (P. 6, slip opinion)

> "* * *As the court instructed:
>
> > The proximate cause of an injury is defined in the law as that cause which in natural and continual sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred.
>
> "This statement of the law has consistent support in the decisions of our court, which has often held that proximate cause is 'that cause which, in natural and continual sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred.' *Howard v. Swagart,* 82 U.S.App.D.C. 147, 151, 161 F.2d 651, 655; *S.S. Kresge Co. v. Kenney,* 66 App.D.C. 274, 86 F.2d 651.* * *"

Consistent with this statement is the below quoted portion of the opinion by this Court in *Pennsylvania Railroad Company v. Pomeroy,* 1956, 99 U.S.App.D.C. 272, 239 F.2d 435, 444:

> "It is axiomatic that, to prevail in a negligence case, a plaintiff must prove sufficient facts, not only to warrant an inference of negligence, but also to justify an inference that such negligence was proximately related to the injury or death."

The effect of the decision at bar is to remove the burden of proving proximate cause by allowing a jury, despite the clear meaning of the definition, to decide under almost any set of circumstances whether plaintiff should recover. It is one thing to prove facts consistent with the definition of proximate cause from which a jury might choose one inference as against another, which, to it, is more convincing. It is entirely another thing to set forth a factual pattern which defies inclusion in the accepted definition of proximate cause, and yet allow the jury to find that it does. Once the "flight" terminates or the thief is no longer escaping from the place of the theft, a jury could not reasonably find that the negligence alleged, "in *natural* and *continual* sequence" produced the injury. In that event, the negligence becomes remote as it must for any sensible application of the definition.

Whether the time factor is 32 hours, 32 days or 32 months is really of no consequence, as once the flight ceases, the "natural and continual" element of the definition of proximate cause is *ipso facto* rendered inapplicable. Otherwise the oft-repeated element in plaintiff's burden of proof reduces to legal jargon to which only lip service could be paid.

III.

The Decision in Casey Is Sound Law; It Represents the Overwhelming Majority View and It Should Accordingly Be Followed.

It is not suggested here for the moment that all auto-theft cases where an innocent third-party is injured by the negligence of the thief present questions of law to be decided by the Court. On the contrary, the factual issue on proximate cause would be whether or not the thief was still fleeing from the place of the theft. It should be noted also that in *Ney, supra,* the thief was in flight at the time of the accident in question.

This case stands alone in the literally hundreds of reported cases dealing with the negligent operation of a thief in a stolen vehicle [For the various groupings of these cases, see pages 15-17 of appellant's brief.], and it cannot have a wholesome effect. For plaintiff to recover in a negligence case, his burden should remain two-fold. He should prove facts upon which a jury could infer negligence, but also that such negligence was proximately related to the injury within the legally accepted definition of proximate cause. The latter burden was not met here and it is respectfully submitted that the petition for rehearing by the Division or for a hearing en banc should be granted.

Respectfully submitted,

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CERTIFICATE OF GOOD FAITH

I certify under the provisions of Rule 26 of this Court that the above petition is presented in good faith and not for purposes of delay.

_____

John F. Mahoney, Jr.

CERTIFICATE OF SERVICE

Service of a copy of the foregoing petition was made upon Harry W. Goldberg, Esquire, 1511 K Street, N. W., Washington, D. C. 20005, attorney for appellee, this __ day of February, 1968.

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John F. Mahoney, Jr.